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tatus: GRANTED

ocketed:  
ovember 5, 1985

Title: Immigration and Naturalization Service, Petitioner  
V.  
Luz Marina Cardoza-Fonseca

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Keener, Dana Marks

ntry	Date	Note	Proceedings and Orders
1	Nov 5 1985	G	Petition for writ of certiorari filed.
3	Nov 20 1985		Order extending time to file response to petition until January 12, 1986.
4	Jan 13 1986		Brief of respondent Luz Marina Cardoza-Fonseca in opposition filed.
5	Jan 15 1986		DISTRIBUTED. February 21, 1986
6	Jan 21 1986	X	Reply brief of petitioner INS filed.
7	Feb 24 1986		Petition GRANTED. *****
8	Feb 25 1986	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Mar 10 1986		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. Justice Brennan OUT.
11	Apr 7 1986		Order extending time to file brief of petitioner on the merits until May 10, 1986.
12	Apr 14 1986		Record filed.
13	Apr 14 1986		Certified original record and proceedings, 2 volumes, received.
14	May 9 1986		Brief of petitioner INS filed.
16	Jun 2 1986		Order extending time to file brief of respondent on the merits until July 14, 1986.
17	Jul 12 1986		Ten copies of lodging received.
18	Jul 12 1986		Brief amicus curiae of Lawyers Committee for Human Rights, et al. filed.
19	Jul 14 1986		Brief amicus curiae of ACLU et al. filed.
20	Jul 14 1986		Brief amicus curiae of United Nations High Commissioner for Refugees filed.
22	Jul 14 1986		Brief amicus curiae of American Immigration Lawyers Assn. filed.
23	Jul 14 1986		Brief of respondent Luz Marina Cardoza-Fonseca filed.
24	Jul 14 1986		Brief amicus curiae of Internatl. Human Rights Law Group, et al. filed.
25	Jul 25 1986		CIRCULATED.
26	Jul 28 1986		SET FOR ARGUMENT. Tuesday, October 7, 1986. (1st case) (1 hour).
27	Sep 25 1986	X	Reply brief of petitioner INS filed.
28	Oct 7 1986		ARGUED.

85-782

FILED

NOV 5 1985

JOSEPH F. SPANIO, JR.  
CLERK

No.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1985**

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**IMMIGRATION AND NATURALIZATION SERVICE,  
PETITIONER**

**v.**

**LUZ MARINA CARDOZA-FONSECA**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**CHARLES FRIED**

*Solicitor General*

**RICHARD K. WILLARD**

*Assistant Attorney General*

**KENNETH S. GELLER**

*Deputy Sclicitor General*

**BRUCE N. KUHLIK**

*Assistant to the Solicitor General*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

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### **QUESTION PRESENTED**

Whether an alien's burden of proving eligibility for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1253(h).

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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No.

IMMIGRATION AND NATURALIZATION SERVICE,  
PETITIONER

*v.*

LUZ MARINA CARDOZA-FONSECA

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 767 F.2d 1448. The opinions of the Board of Immigration Appeals (App., *infra*, 17a-23a) and of the immigration judge (App., *infra*, 24a-28a) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

Section 101(a)(42) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(42), provides in pertinent part:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion \* \* \*.

Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Section 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h)(1), provides in pertinent part:

The Attorney General shall not deport or return any alien \* \* \* to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

### STATEMENT

1. Respondent is a 37-year old native and citizen of Nicaragua. She entered the United States on June 25, 1979, as a nonimmigrant visitor authorized to remain until September 30, 1979. After staying in this country beyond that date without permission, respondent was granted the privilege of voluntarily departing the United States by September 28, 1980. Respondent failed to take advantage of this opportunity, and deportation proceedings were instituted against her in March 1981. App., *infra*, 25a.

a. At a hearing in December 1981 before an immigration judge, respondent, who was represented by counsel, conceded deportability and requested asylum and withholding of deportation pursuant to Sections 208(a) and 243(h), respectively, of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), 1253(h). App., *infra*, 25a. Respondent testified that, although "she was a nonpolitical person" (*id.* at 27a), she felt that she would be persecuted in Nicaragua on the basis of the political activities of her brother, who testified that "the Sandinistas would persecute him" because he is "no longer involved with that party or sympathetic to its ends" (*id.* at 25a).

The immigration judge denied respondent's request for asylum and withholding of deportation (App., *infra*, 24a-28a). He stated that the governing legal standard was whether respondent had shown "a clear probability of persecution" if she returned to Nicaragua (*id.* at 27a). The immigration judge concluded that there was no evidence "indicat[ing] that the respondent would be persecuted for [her] political beliefs, whatever they may be" (*ibid.*). The immigration judge noted that, whatever the merits of her brother's claim that he would be persecuted, respond-

ent had not shown that any other members of her family faced a similar danger (*ibid.*).

b. The Board of Immigration Appeals dismissed respondent's appeal (App., *infra*, 17a-23a). The Board "agree[d] with the immigration judge that the respondent ha[d] failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act" (*id.* at 21a). In response to her contention that "the immigration judge applied the wrong legal standard" to respondent's asylum claim by requiring her to show a "clear probability of persecution" rather than a "well-founded fear of persecution" (*id.* at 18a-19a), the Board stated that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood'" of persecution (*id.* at 21a).

The Board determined that respondent "failed to support, through objective evidence, her generalized assertion that she will be subject to persecution based on her brother's political problems with the Sandinistas" (App., *infra*, 21a). In support of this conclusion, the Board noted that respondent "admitted that she herself has taken no actions against the Nicaraguan government[,] \* \* \* has never been politically active[,] \* \* \* [has] never assisted her brother in any of his political activities[,] \* \* \* [and] has never been singled out for persecution by the present government" (*id.* at 22a). Finally, the Board characterized respondent's unsupported fears based on her relationship to her brother as "mere speculation" (*ibid.*).

2. The court of appeals reversed the Board's denial of asylum and remanded for further proceedings

(App., *infra*, 1a-16a).<sup>1</sup> The court held (*id.* at 4a-9a) that an alien's burden of proving a "well-founded fear" of persecution to establish eligibility for asylum is less demanding than the burden of proving a "clear probability" of persecution, which this Court held in *INS v. Stevic*, No. 82-973 (June 5, 1984), is the proper standard to establish eligibility for withholding of deportation. In reaching its conclusion, the court of appeals rejected (App., *infra*, 5a, 11a) the position of the Board of Immigration Appeals (*id.* at 31a) "that as a practical matter" the two standards "converge[.]" *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (App., *infra*, 29a-68a). In the court's view, the different formulations of the burdens of proof that it mandated for obtaining asylum and withholding of deportation entailed "a significant practical consequence" (App., *infra*, 9a):

The term "clear probability" requires a showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a substantive fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

So long as an alien subjectively fears persecution, he will be eligible for asylum under the court's test if

<sup>1</sup> The court of appeals' decision also addressed the Board's denial of relief to another alien, Francisca Rosa Arguello-Salguera, whose case had been separately briefed and argued. We are not seeking review of the judgment with respect to Arguello-Salguera.



he can point to specific facts "support[ing] an inference of past persecution or risk of future persecution" (App., *infra*, 10a-11a).

The court concluded (App., *infra*, 12a-13a) that the Board erred in this case by applying the same burden of proving a clear probability of persecution to respondent's asylum claim as to her claim for withholding of deportation, rather than determining separately whether respondent had a "well-founded fear" of persecution. It therefore remanded for consideration of respondent's asylum claim "under the proper legal standard" (*id.* at 14a). Respondent had not appealed the denial of her request for withholding of deportation (*id.* at 3a), and the court therefore did not disturb the Board's ruling that she is not entitled to that relief.

#### REASONS FOR GRANTING THE PETITION

In *INS v. Stevic*, No. 82-973 (June 5, 1984), this Court held that an alien must demonstrate a clear probability of persecution, defined as a showing that "it is more likely than not that the alien would be subject to persecution" (slip op. 16), in order to establish eligibility for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. Although the parties and most of the amici in *Stevic* assumed that the standard for asylum under Section 208(a) of the Act is equivalent to that for withholding of deportation,<sup>2</sup> the Court left open the possibility that the standards might differ (slip op. 17, 22). Since *Stevic*, the courts of appeals have divided on the question left undecided in that case. The standard adopted by the Ninth Cir-

<sup>2</sup> Gov't Br. at 20-21 & n.21; Resp. Br. at 40; *e.g.*, Amnesty Int'l USA Amicus Br. at 54-58. But see American Immigration Lawyers Ass'n Amicus Br. at 26-27 n.23.

cuit rests on an erroneous understanding of the Act, fails to accord appropriate deference to the decisions of the Board of Immigration Appeals, and anomalously allows aliens to obtain the broader relief afforded by asylum on a lesser showing of persecution than is required for withholding of deportation. Because the proper formulation of the burden of proof that an alien must meet in order to establish eligibility for asylum is an important and frequently recurring issue on which there is a conflict among the courts of appeals, review by this Court is plainly warranted.

1. There is a direct conflict among the courts of appeals concerning the question presented by this case. In *Sankar v. INS*, 757 F.2d 532 (1985), the Third Circuit held that the clear probability and well-founded fear standards are equivalent (*id.* at 533):

Our court has held unequivocally that the "well-founded fear" standard enunciated in section 1101(a)(42)(A) does not differ from the "clear probability" standard. *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 (3d Cir. 1983). Although the court decided these cases within the context of a section 1153(h) claim for withholding of deportation, the holdings equally apply in the asylum situation and control our decision in this case. \* \* \* *Stevic* leaves our prior decisions undisturbed. We hold now that the BIA did not abuse its discretion when it equated a "well-founded fear" with a "clear probability," "good reason," or "realistic likelihood" \* \* \*.

See also *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984).<sup>3</sup> The Sixth Circuit has also held in some cases

<sup>3</sup> Although the court of appeals in this case correctly noted (App., *infra*, 11a n.5) that the Third Circuit's discussion of

that where, as here, the request for asylum is made for the first time after the institution of deportation proceedings, the alien must establish a clear probability of persecution in order to be eligible for asylum, just as for withholding of deportation. See *Reyes v. INS*, 747 F.2d 1045, 1046 (1984), cert. denied, No. 84-6145 (Apr. 22, 1985); *Dally v. INS*, 744 F.2d 1191, 1192, 1196 & n.6 (1984). But see *Dolores v. INS*, 772 F.2d 223, 225-226 (1985); cf., e.g., *Moosa v. INS*, 760 F.2d 715 (1985) (applying different standards where request for asylum is made before deportation proceedings have commenced).<sup>4</sup>

In addition to the holding of the Ninth Circuit in this case,<sup>5</sup> the Seventh Circuit has stated in a lengthy

the burden of proof in *Sotto* was "not necessary to its holding," it did not address the decision in *Sankar*, which squarely holds that the asylum and withholding standards are identical.

<sup>4</sup> The Sixth Circuit's application of the same burden of proof to certain asylum claims as to withholding of deportation claims apparently rests on an INS regulation providing that asylum requests made after the institution of deportation proceedings "shall also be considered as requests" for withholding relief. 8 C.F.R. 208.3(b); see *Dally*, 744 F.2d at 1196 n.6. This Court made clear in *Stevic*, however, that this regulation "does not speak to the burden of proof issue" (slip op. 15 n.18). In *Dolores*, 772 F.2d at 225-226, the Sixth Circuit applied different standards to asylum and withholding claims raised for the first time after the initiation of deportation proceedings without referring to its earlier decisions in *Dally* and *Reyes*.

<sup>5</sup> The Ninth Circuit had also stated in an earlier case that the burden of proof for asylum is different from that for withholding of deportation, but its discussion was dicta because the court held that the alien had, in any event, met the higher burden of demonstrating a clear probability of persecution. *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (1984). Here, the court's judgment—which does not even address respondent's entitlement to withholding of deportation (see

dictum its view that the burden of establishing eligibility for asylum is not equivalent to that for withholding of deportation. *Carvajal-Munoz v. INS*, 743 F.2d 562, 572-575 (1984). While the Seventh Circuit considers the standards to be "very similar," the court made clear its position that they are "not identical" (*id.* at 575). This Court should resolve the disagreement among the courts of appeals with respect to the appropriate burden of proof in asylum cases.

2. The decision below is erroneous. In *Stevic*, this Court concluded that Congress, in enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, did not alter the standard that an alien must meet in order to establish eligibility for withholding of deportation (slip op. 6, 17-20). It is equally clear that Congress did not intend the anomaly of imposing a lesser burden on applicants for asylum, which provides more extensive relief than does withholding of deportation.<sup>6</sup> The Board of Immigration Appeals, whose construction of the Act is entitled to substan-

page 6, *supra*)—plainly rests on its conclusion that the Board should have applied a less demanding burden of proof to respondent's asylum claim.

<sup>6</sup> Unlike an alien who obtains only withholding of deportation, an alien who is granted asylum has the opportunity to become a lawful permanent resident of this country. Moreover, an asylee who obtains permanent resident status may not be deported to any country, while an alien who is granted only withholding relief may be deported to countries other than those in which he would be subject to persecution. See App., *infra*, 58a-59a; compare Sections 208 and 209, 8 U.S.C. 1158, 1159, 8 C.F.R. 209.2 (asylum) with Section 243(h), 8 U.S.C. 1253(h) (withholding of deportation). It would be unreasonable to conclude that Congress intended to permit the greater relief afforded by asylum to be granted on a lesser showing of persecution than that required for withholding of deportation.



tial deference (*INS v. Wang*, 450 U.S. 139, 144-145 (1981)), has recently reexamined the Act and its legislative history at length, and has adhered to its longstanding position that the burden of proof required to establish eligibility for asylum is equivalent to that for withholding of deportation. *In re Acosta-Solorzano*, *supra* (App., *infra*, 29a-68a). There is no warrant for the court of appeals' failure to defer to the Board's conclusion.

a. To be eligible for asylum under Section 208(a) of the Act, an alien must qualify as a "refugee" under Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). The definition of refugee in Section 101(a)(42)(A), which sets forth the "well-founded fear" requirement, was added to the Act by the Refugee Act of 1980. This new definition, along with other provisions of the Refugee Act, was intended to conform United States law to the terms of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 *et seq.*, to which this country acceded in 1968, by eliminating the geographical and ideological limitations that had been imposed previously under the Act with respect to refugees seeking *admission* to this country. See *Stevic*, slip op. 17, 19. Congress did not intend in 1980 to alter the standard required of an alien in this country seeking to avoid deportation, a standard consistently understood, under the "well-founded fear" language of the Protocol as well as under the Act, to require a showing that the alien would more likely than not be subject to persecution.

b. The history of United States refugee law and practice prior to 1980 is recounted in *Stevic*, slip op. 6-12. Before 1968, aliens in this country seeking withholding of deportation were required to show a "clear probability" or a "likelihood" of persecution

(*id.* at 6-7).<sup>7</sup> In 1968, the United States acceded to the Protocol, which defined a "refugee" as one who had a "well-founded fear of being persecuted." The Protocol also required compliance with Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176, which prohibited the expulsion of any "refugee" to countries where "his life or freedom would be threatened." As the Court concluded in *Stevic* (slip op. 9), "[t]he President and the Senate believed that the Protocol was largely consistent with existing law."

In 1973, the Board of Immigration Appeals addressed the question essentially presented in the case, whether the "well-founded fear" standard of the Protocol differed from the burden of proving a likelihood of persecution that had been applied prior to 1968. In *In re Dunar*, 14 I. & N. Dec. 310, the Board concluded, consistent with the understanding in 1968 that our law already conformed to the Protocol, that the standards are not materially different. The courts of appeals agreed that an alien must show a clear probability or likelihood of persecution in order to establish that his fear is well-founded. See, *e.g.*, *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978);

<sup>7</sup> Prior to 1980, there was no statutory provision for asylum for aliens already within the United States. Withholding of deportation was available under Section 243(h) as it then stood for aliens who, in the judgment of the Attorney General, "would be subject to persecution." 8 U.S.C. (1976 ed.) 1253(h). A regulation permitting aliens to apply for asylum was added for the first time in 1974. 8 C.F.R. Pt. 108 (1975). This provision was revoked following the creation of a statutory asylum scheme in 1980. See 46 Fed. Reg. 45117 (1981). As we explain below (page 14), prior to 1980 requests for asylum were treated in relevant respects as equivalent to requests for withholding of deportation.



*Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977); see also *Stevic*, slip op. 10-12.

c. Thus, prior to 1980, the "well-founded fear" standard of the Protocol was understood to be equivalent to the "clear probability" standard, both requiring a showing that it was more likely than not that an alien would be persecuted if deported. It is plain that Congress did not intend to alter this understanding when it incorporated the "well-founded fear" language as part of the definition of "refugee" added to the Act in the Refugee Act of 1980. Nor did Congress intend, in the course of systematizing the procedures under which aliens could avoid deportation on grounds of persecution, to create two alternative avenues of relief, governed by different substantive standards.

As the Court concluded in *Stevic* (slip op. 17 (emphasis in original)), "[t]he primary substantive change Congress intended to make under the Refugee Act \* \* \* was to eliminate the piecemeal approach to admission of refugees" that previously existed under the Act. By contrast, Congress evinced no intent to alter the law concerning aliens already within this country or at its borders who desired to avoid deportation or return to a country in which they feared persecution. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981). Rather, by both amending Section 243(h) and, for the first time, including in the Act a provision for asylum, Congress expressly intended simply to conform United States domestic law to reflect its international obligations under the United Nations Protocol. As the Senate Report stated, "[t]he substantive standard is not

changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979); see also H.R. Rep. 96-608, 96th Cong., 1st Sess. 17-18 (1979) (the Refugee Act "conforms United States statutory law to our obligations under Article 33" of the Convention); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of David Martin, Office of the Legal Adviser, Department of State) ("[f]or purposes of asylum, the provisions in this bill do not really change the standards").

By the same token, both the House and Senate reports made clear that the new definition of "refugee" contained in Section 101(a)(42)(A) was intended simply to conform to the definition in the Protocol. H.R. Rep. 96-608, *supra*, at 9; S. Rep. 96-256, *supra*, at 4, 14-15. Nowhere in the legislative history of the Refugee Act is there any suggestion that the use of the phrase "well-founded fear of persecution" was intended to alter the standard by which an alien was required to prove eligibility for withholding of deportation or asylum. Rather, the legislative history indicates that the only change Congress contemplated would result from incorporation of the United Nations' definition was the elimination of the discrimination inherent in the ideological and geographical restrictions that had previously been placed on conditional entry into this country (see *Stevic*, slip op. 7, 19).

Nor is there any indication that Congress intended to drive a wedge between asylum and withholding re-

lief by mandating a lower burden of proof for the former. Indeed, as we have discussed (page 9 & note 6, *supra*), such an approach would be completely anomalous. In any event, as the Board has stated (App., *infra*, 58a n.13), "Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibility for these forms of relief to be essentially comparable." Prior to 1980, to the extent that an alien's request for "asylum" was considered in the context of the prohibition on deportation set forth in Article 33 of the Convention, an alien had the same burden of proof to establish his eligibility for this relief as he did for withholding of deportation under Section 243(h) of the Act (App., *infra*, 57a n.12; see also *Stevic*, slip op. 12-13 n.13). Congress intended in the Refugee Act to "preserv[e] this relationship" between the two forms of relief (App., *infra*, 57a (footnote omitted)).

In short, the prohibition on withholding of deportation contained in Section 243(h) of the Act ensures that our domestic law meets the obligations imposed through the Protocol under Article 33 of the Convention by preventing the deportation of an alien to a country where he is likely to be persecuted. Prior to 1980, Section 243(h) prevented, consistent with the Protocol, the deportation of refugees, *i.e.*, those persons with a well-founded fear of persecution. It serves the same function now. Beyond that, Section 208 of the Act gives those aliens who qualify for withholding of deportation the opportunity also to obtain the additional benefits provided by asylum (see note 6, *supra*). There is simply no basis for concluding that Congress intended to create separate avenues for relief, thereby allowing those aliens who

could not show a sufficient likelihood of persecution to obtain the legal bar to their deportation established by Section 243(h) and the Protocol a second bite at the apple under Section 208. Congress's express reliance on the "well-founded fear" standard for asylum but not for withholding relief thus was not intended to establish a lower burden of proof for asylum; and in any event, as discussed above (pages 10-12), the content of the "well-founded fear" standard had, prior to 1980, always been treated as equivalent to that of the "clear probability" requirement, an equivalence that Congress did not intend to upset in the Refugee Act.

d. Cognizant of the division among the courts of appeals that has developed since this Court left the question open in *Stevic* (see App., *infra*, 32a), the Board of Immigration Appeals recently undertook a comprehensive reexamination of its longstanding position that the "well-founded fear" standard does not, in practical terms, differ from the "clear probability" requirement. *In re Acosta-Solorzano*, *supra* (App., *infra*, 23a-68a). "Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference \* \* \*." *United States v. Clark*, 454 U.S. 555, 565 (1982). Accordingly, the Board's view of the standard by which an alien must prove eligibility for asylum, as expressed in *Acosta-Solorzano*, is entitled to substantial weight. See, *e.g.*, *INS v. Wang*, *supra*.<sup>8</sup>

<sup>8</sup> With certain exceptions not relevant here, the Attorney General is charged with the administration and enforcement of the Act, 8 U.S.C. 1103(a). He, in turn, has delegated to the Board appellate authority over decisions of special inquiry officers in deportation cases (see 8 C.F.R. 3.1(b)(2), 242.17(c)). The Board's decisions are final unless referred to the Attorney General (8 C.F.R. 3.1(d)(2) and (h)).



The Board began its analysis with the 1973 decision in *In re Dunar, supra*, in which it equated the Protocol's "well-founded fear" standard with the clear probability or likelihood of persecution standard that had developed under domestic law (App., *infra*, 47a-48a). The Board noted that its construction "was accepted by the courts and thereafter 'a well-founded fear' of persecution was understood to mean that an alien had to produce objective evidence showing a likelihood or probability of persecution" (*id.* at 48a). It concluded that "Congress did not indicate in the legislative history of the Refugee Act of 1980 that it intended to alter the accepted construction of 'a well-founded fear of persecution' by using this phrase in the definition of a refugee in section 101(a)(42)(A) of the Act" (*ibid.*). Accordingly, the Board saw "no valid reason for departing from the construction of the well-founded-fear standard that prevailed in this country prior to the Refugee Act of 1980," and it decided to "continue to construe 'a well-founded fear of persecution' to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country" (*id.* at 50a). Its treatment of the "standards for asylum and withholding of deportation [as] not meaningfully different" was, in the Board's view, "most consistent with what [it] perceive[d] to have been Congress' understanding of the relationship between asylum and withholding of deportation at the time the present provisions were enacted in the Refugee Act of 1980 (*id.* at 56a; see page 14, *supra*)."

<sup>9</sup> In the absence of clear congressional intent to the contrary, the Board surely acted reasonably in construing the applicable burdens of proof to avoid the peculiar result of

In explaining the practical content of the "well-founded fear" standard, the Board relied on "two fundamental concepts" (App., *infra*, 50a). First, "an alien's fear of persecution cannot be purely subjective or conjectural, it must have a solid basis in objective facts or events" (*id.* at 50a-51a). Second, "in order to warrant the protection afforded by a grant of refuge, an alien must show it is likely he will become the victim of persecution" (*id.* at 51a). This standard does not "require[] an alien to establish to a particular degree of certainty \* \* \* that he will become a victim of persecution" (*id.* at 51a-52a). "Rather, as a practical matter," the Board explained, its standard "can best be described as follows" (*id.* at 52a):

[T]he evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

The Board did not view the "clear probability" standard, which requires a showing that persecution is "more likely than not" to occur (*Stevic*, slip op. 16; App., *infra*, 55a), as different, in practical terms, from the showing required under the "well-founded fear" standard (*id.* at 56a):

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granting the greater relief afforded by asylum to an alien who cannot meet the standard required for withholding of deportation (see page 9 & note 6, *supra*.)



[T]he facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur. As we construe them, both the well-founded-fear standard for asylum and the clear-probability standard for withholding of deportation require an alien's facts to show [the four factors set forth above].

In light of this analysis, the Board concluded (*ibid.*) that "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge."

The court below rejected the Board's position in *Acosta-Solorzano* (App., *infra*, 5a, 11a-12a). It concluded that an alien who subjectively fears persecution need only produce evidence showing that his fear has "enough of a basis that it can be considered well-founded" (*id.* at 9a). In attempting to explain what constitutes "enough of a basis," the court of appeals stated that it would require sufficient evidence to show a "'good reason' to fear future persecution" (*ibid.* (quoting *Carvajal-Munoz*, 743 F.2d at 574)). The court failed, however, to address the Board's conclusion that the "good reason" standard "do[es] not re-

flect the generally understood meaning of 'well-founded' \* \* \* [or] reflect the understanding of Congress, and the meaning of the Protocol, that an alien must show it is likely he will become a victim of persecution before he is eligible for refuge" (App., *infra*, 53a).

3. The decision below, if permitted to stand, will impose a substantial administrative burden on the Board and on the Immigration and Naturalization Service. It will render thousands of denials of asylum in cases decided since 1980 subject to attack on motions to reopen and will cloud the adjudication of the thousands of asylum cases that are currently undergoing initial administrative evaluation and review.<sup>10</sup> Moreover, the conflict in the courts of appeals will result in the disparate treatment of aliens seeking asylum in different parts of the country. Such a significant decision as whether or not an alien obtains asylum should not depend on the happenstance of the circuit in which he seeks review. In *Stevic*, the Court noted (slip op. 5) the importance of the question of the proper burden of proof for an alien seeking to avoid deportation on the ground of persecution. That question, which the Court expressly (*id.* at 17, 22) left unanswered with respect to requests for asylum, is no less important now.

<sup>10</sup> We are informed that over 11,000 asylum applications were filed with the Executive Office for Immigration Review during the past fiscal year.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED

*Solicitor General*

RICHARD K. WILLARD

*Assistant Attorney General*

KENNETH S. GELLER

*Deputy Solicitor General*

BRUCE N. KUHLIK

*Assistant to the Solicitor General*

NOVEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 83-7777

I&NS NO. A 24 420 980

LUZ MARINA CARDOZA-FONSECA, PETITIONER

*vs.*

U.S. IMMIGRATION AND NATURALIZATION SERVICE,  
RESPONDENT

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No. 84-7593

I&NS NO. A 23 108 407

FRANCISCA ROSA ARGUELLO-SALGUERA, PETITIONER

*vs.*

IMMIGRATION AND NATURALIZATION SERVICE,  
RESPONDENT

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Appeals from Orders of the  
Board of Immigration Appeals

No. 83-7777—Argued and Submitted June 10, 1985

No. 84-7593—Argued and Submitted June 13, 1985

San Francisco, California

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(1a)

[Filed Aug. 12, 1985]

[As amended Aug. 23, 1985]

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OPINION

Before: SKOPIL, REINHARDT, and HALL, Circuit Judges

REINHARDT, Circuit Judge:

In both these cases the Board of Immigration Appeals applied an incorrect legal standard when it determined that the petitioners failed to establish their eligibility for asylum under section 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982). Rather than applying the "well-founded fear" standard, which governs asylum determinations, the Board applied the "clear probability" standard, which governs prohibitions against deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h). Because the Board failed to apply the correct legal standard in evaluating the petitioners' claims, we reverse the Board's orders denying asylum and remand for reconsideration. In addition, the Board failed clearly to articulate the basis for its refusal to grant Arguello-Salguera relief under section 243(h). We reverse that determination as well.

I. *FACTS*

A. *Cardoza-Fonseca*

Petitioner Luz Marina Cardoza-Fonseca is a citizen of Nicaragua who entered this country as a non-immigrant visitor on June 25, 1979. She remained beyond her authorized stay and the INS initiated deportation proceedings. At her deportation hearing on

December 14, 1981, Cardoza-Fonseca conceded that she was otherwise deportable and applied for asylum under section 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982), and for a prohibition against deportation under section 234(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1982).<sup>1</sup> The immigration judge applied only a "clear probability of persecution" standard and determined that Cardoza-Fonseca was not entitled to relief from deportation. The BIA affirmed, stating that no matter what burden of proof Cardoza-Fonseca faced, whether "'clear probability,' 'good reason' or 'realistic likelihood,'" all of which the Board thought to be identical, she failed to show that she "*would* suffer persecution" (emphasis added). The Board also reasoned that her claim failed because she had not introduced any objective evidence to demonstrate that she "*will* be subject to persecution" (emphasis added). Cardoza-Fonseca appeals only from the denial of her claim for relief under section 208(a).

B. *Arguello-Salguera*

Petitioner Francisca Rosa Arguello-Salguera is a Nicaraguan citizen who entered the United States without inspection on March 15, 1980. At her first deportation hearing on March 27, 1980, she was granted permission to apply for asylum and a prohibi-

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<sup>1</sup> Requests for asylum under § 208(a), when made after the initiation of deportation proceedings, are also considered as requests for a prohibition against deportation under § 243(h). See 8 C.F.R. § 208.3(b) (1984). The benefits granted under the two forms of relief differ somewhat. In particular, an alien who is granted asylum has an automatic right after one year to apply for adjustment of status to permanent resident alien. See 8 C.F.R. § 209.2 (1984).



tion against deportation. At her second deportation hearing on September 10, 1981, she conceded deportability. After a third hearing on October 1, 1982, the immigration judge determined that Arguello-Salguera was a credible witness who presented believable testimony and that she had demonstrated both a clear probability and a well-founded fear of persecution. Accordingly, he concluded that the Attorney General was prohibited from deporting her and he granted her request for asylum. The BIA reversed, applying only the clear probability test and concluding that Arguello-Salguera had "failed to show that she *would* be persecuted" if she returned to Nicaragua (emphasis added). Arguello-Salguera appeals from the denial of her claims for relief under both section 208(a) and section 243(h).<sup>2</sup>

## II. THE ASYLUM CLAIMS

### A. The Legal Standard

Section 208(a) of the Refugee Act gives the Attorney General discretionary authority to grant

<sup>2</sup> Arguello-Salguera also appeals from the Board's summary denial of her motion to dismiss the INS's appeal of the immigration judge's decision on the grounds that the appeal was dilatory, inadequate, and frivolous. She also appeals the Board's denial of her request for voluntary departure. We affirm the Board's denial of the motion to dismiss the INS's appeal. Unlike the notice of appeal in *Matter of Holquin*, 13 I&N 423, 425 (BIA 1969), on which petitioner relies, the INS's notice of appeal in this case gave sufficient notice of the basis for the appeal to preclude us from determining that the Board erred in denying the motion. Because of the decision we reach regarding Arguello-Salguera's § 208 (a) and § 243(h) claims, we need not consider whether the Board abused its discretion, see 8 U.S.C. § 1254(e) (1982), in denying voluntary departure.

asylum to any alien who qualifies as a refugee under section 101(a)(42)(A) of that Act. Refugees are those persons outside their native country who cannot return because of "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1982). Although the Attorney General has discretion to grant asylum to refugees, the determination of refugee status depends on *factual findings*. *INS v. Stevic*, 104 S. Ct. 2489, 2497 n.18 (1984); *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1539 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984); *Carvajal-Munoz v. INS*, 743 F.2d 562, 567 (7th Cir. 1984).

The plain terms of section 208(a) require applicants for asylum to demonstrate a "well-founded fear" of persecution. In both of the cases before us the government contends that the "well-founded fear" standard is equivalent to the "clear probability of persecution" standard. This has consistently been the Board's position. See, e.g., *Matter of Acosta*, Interim Dec. No. 2986, slip op. at 25 (BIA March 1, 1985); *Matter of Salim*, 18 I&N Dec. 311, 314 (BIA 1982); *Matter of Lam*, 18 I&N Dec. 15 (BIA 1981); *Matter of Dunar*, 14 I&N Dec. 310, 319-20 (BIA 1973). The "clear probability" standard that the Board finds appropriate for the disposition of asylum cases is in fact applicable to claims for prohibition against deportation under section 243(h), see *Stevic*, 104 S. Ct. at 2501; *Espinoza-Martinez*, 754 F.2d at 1539; *Bolanos-Hernandez*, 749 F.2d at 1320; *Carvajal-Munoz*, 743 F.2d at 568, and not to section 208(a) asylum claims.

Prior to the Supreme Court's decision in *Stevic*, there was considerable confusion over whether the



"clear probability" standard differed from the "well-founded fear" standard. Many circuit courts had simply assumed that the criteria for eligibility for a grant of asylum under section 208(a) were identical to those for a prohibition of deportation under section 243(h). See *Bolanos-Hernandez*, 749 F.2d at 1321 n.10 (listing cases and explaining that some courts applied "clear probability" standard to all claims, while others applied "well-founded fear" standard to all claims). However, in *Stevic* the Court, while not deciding the question, clearly alerted the circuit courts and the Board to the distinct possibility that there is a significant difference between the two tests. The Court expressly assumed, for purposes of the case before it, that the "well-founded fear" standard applicable in asylum cases is "more generous" than the "clear probability of persecution" standard. 104 S. Ct. at 2498.

Following *Stevic*, we, along with the Sixth and Seventh Circuits, unequivocally held that the "well-founded fear" standard is, in fact, "more generous" than the "clear probability" standard. See *Argueta v. INS*, 759 F.2d 1395, 1396-97 (9th Cir. 1985); *Bolanos-Hernandez*, 749 F.2d at 1321 (9th Cir. 1984); accord *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984); *Carvajal-Munoz*, 743 F.2d at 574-75. We noted that a recognition of the difference between the standards comports with the structure of the Immigration Act. We said that there is a valid reason for applying a stricter standard where an alien claims he or she is entitled to a mandatory prohibition against deportation than where that person is asking only that he or she be found eligible for consideration for a grant of asylum, a grant that ultimately will be made or denied by the Attorney

General in the exercise of his discretion. *Bolanos-Hernandez*, 749 F.2d at 1321-22; accord *Carvajal-Munoz*, 743 F.2d at 575.

In *Bolanos-Hernandez* we discussed the meaning of the "clear probability" test. We said, "[t]he question under [the section 243(h)] standard is whether it is more likely than not that the alien would be subject to persecution." 749 F.2d at 1320 (quoting *Stevic*, 104 S. Ct. at 2498). We concluded that general evidence of widespread conditions of violence in a country is not in itself sufficient to establish a clear probability of persecution, *id.* at 1323 (citing *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984)), and that there must be some evidence that (1) the applicant or those similarly situated are at greater risk than the general population, *see id.* at 1323, and (2) that the threat to the applicant is a serious one, *id.* at 1324.<sup>3</sup>

It is apparent from the very words of the statute that the burden under the asylum section (section 208(a)) is not identical to the prohibition-against-deportation (section 243(h)) burden that we have just described. In order to qualify for relief under section 243(h), an alien must introduce evidence demonstrating that his or her "life or freedom" would be threatened, 8 U.S.C. § 1253(h) (1982). It is this

<sup>3</sup> Although independent corroborative evidence of the threat is not necessary, *Bolanos-Hernandez*, 749 F.2d at 1324, the applicant must introduce some evidence that supports the contention that "the group making the threat has the will or ability to carry it out," *id.* We found that *Bolanos-Hernandez's* unrefuted credible testimony about a specific, serious threat, supported by documentary evidence that demonstrated that the group that made the threat had in the past carried out violence of the sort threatened, was sufficient to establish a likelihood of persecution.

statutory test that the courts have held is met by demonstrating a "clear probability of persecution." In contrast, the statutory section that specifies the burden an alien must meet in order to qualify as a refugee (and thus be eligible for consideration under the asylum provision) does not restrict the harm for which relief may be granted to a threat to "life or freedom." In the case of the refugee provision, the statute itself uses the phrase "persecution," 8 U.S.C. § 1101(a)(42)(A) (1982), which the Supreme Court has noted is "a seemingly broader concept than threats to 'life or freedom.'" *Stevic*, 104 S. Ct. at 2500 n.22. In fact, we have ourselves previously made it clear that the statutory term "persecution" includes more than just restrictions on life and liberty; the term encompasses "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); accord *Bolanos-Hernandez*, 749 F.2d at 1322 n.13. Accordingly, the statutory term "persecution" in the "well-founded fear of persecution" standard encompasses more than the statutory term "threat to life or freedom" and thus more than the non-statutory term "persecution" used in the judicially established "clear probability of persecution" test.

The difference in language between the standards used in asylum and prohibition-against-deportation cases makes another important contrast between the two tests apparent. The term "well-founded fear" refers to a subjective state of mind, while "clear probability" refers to an objective fact. The latter phrase requires an examination of the objective realities, while the former requires an analysis of the applicant's mental state (notwithstanding the fact

that the fear must have some objective basis if we are ultimately to find it well-founded). See *Bolanos-Hernandez*, 749 F.2d at 1321.

There is a significant practical consequence to the fact that different analyses are required under the two standards. The term "clear probability" requires a showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

We have not previously described in any detail the amount and type of evidence required to establish that a fear is "well-founded." Fortunately, however, the Seventh Circuit has done so. In *Carvajal-Munoz*, the Seventh Circuit said that asylum applicants must present "specific facts" through objective evidence to prove either past persecution or "good reason" to fear future persecution. *Carvajal-Munoz*, 743 F.2d at 574. Documentary evidence of past persecution or a threat of future persecution will usually suffice to form the "objective" component of the evidence requirement. However, as the Seventh Circuit noted, refugees sometimes are in no position to gather documentary evidence establishing specific or individual persecution or a threat of such persecution. See *Carvajal-Munoz*, 743 F.2d at 574; accord *Bolanos-Hernandez*, 749 F.2d at 1323-24; *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981). Accordingly, if documentary evidence is not available, the appli-



cant's testimony will suffice if it is credible, persuasive, and refers to "specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds" listed in section 208(a). See *Carvajal-Munoz*, 743 F.2d at 574 (emphasis in original); *McMullen*, 658 F.2d at 1318 (great length and concreteness of alien's testimony held sufficient to establish a likelihood of persecution); *Matter of Sihasale*, 11 I&N Dec. 759, 762 (BIA 1966) (petitioner's "own testimony may be the best—in fact the only—evidence available to her").<sup>4</sup>

Contrary to the government's argument, the approach we have described, which was first articulated by the Seventh Circuit in *Carvajal-Munoz* and subsequently endorsed by us in *Bolanos-Hernandez*, does not render the well-founded fear standard entirely subjective. Applicants must point to specific, objective facts that support an inference of past persecution or risk of future persecution. That the objective facts are established through the credible and persuasive testimony of the applicant does not make those facts less objective. "Mere assertions of possible

<sup>4</sup> This standard accords with the standard used in assessing refugee admissions under former § 203(a)(7) of the Immigration Act, one of the predecessors of § 208(a). See *Carvajal-Munoz*, 743 F.2d at 574. Section 203(a)(7) gave the Attorney General discretion to allow entry of persons fleeing Communist nations or the Middle East because of fear of persecution "on account of race, religion, or political opinion." To obtain relief under § 203(a)(7), aliens had to demonstrate "good reason" to fear persecution by means of "credible testimony or other evidence." *Matter of Ugricic*, 14 I&N Dec. 384, 385-86 (1972).

fear" are still insufficient. *Shoaee v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983). It is only after objective evidence sufficient to suggest a risk of persecution has been introduced that the alien's subjective fears and desire to avoid the risk-laden situation in his or her native land become relevant.

#### B. *The Application of the Legal Standard in These Cases*

Despite the fact that we have held that the "clear probability" and "well-founded fear" standards are not identical, our clear articulation of the stricter "clear probability" standard and the voluminous guidance available to assist in construction of the "more generous" "well-founded fear" standard, the Board continues to maintain that the "well-founded fear" standard and the "clear probability of persecution" standard are, in practice, identical. In *Matter of Acosta*, Interim Dec. No. 2986 (BIA March 1, 1985), the Board again did so, although acknowledging that the Sixth, Seventh, and Ninth Circuits have squarely ruled to the contrary. Slip op. at 23.<sup>5</sup> In

<sup>5</sup> Although not necessary to its holding, the Third Circuit has recently adopted the Board's position that the alien must show a clear probability of persecution to be entitled to relief under § 208(a) or § 243(h). See *Sotto v. United States INS*, 748 F.2d 832, 836 (3d Cir. 1984). In *Sotto* the Third Circuit reversed the Board's decision denying the alien § 208(a) and § 243(h) relief because the Board had failed to consider relevant evidence. *Id.* at 838. Nevertheless, the court felt that an earlier, pre-*Stevic* decision, in which it had concluded that the "well-founded fear" and "clear probability" standards were identical, constrained its conclusion regarding the appropriate burden of proof.



this respect the Board appears to feel that it is exempt from the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and not constrained by circuit court opinions. In *Acosta* it concluded that notwithstanding the law as declared by the Sixth, Seventh, and Ninth Circuits "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." Slip op. at 25. Here, the Board applied its own construction of the applicant's burden of proof in an asylum case to the claims of both Cardoza-Fonseca and Arguello-Salguera. It held that they were required to demonstrate a clear probability of persecution in order to be declared eligible for asylum.

In Cardoza-Fonseca's case, the immigration judge explicitly stated that he used only the clear probability standard. The Board held, consistent with its position in *Acosta*, that "good reason" or "realistic likelihood" <sup>6</sup> meant no more and no less than "clear probability." The Board then proceeded to evaluate Cardoza-Fonseca's asylum application under the more-likely-than-not (clear probability) standard. It concluded that Cardoza-Fonseca failed to meet her burden of proof. The government's brief on appeal similarly asserts that there is "no difference of substance between a 'well-founded fear of persecution' and a 'clear probability of persecution.'"

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<sup>6</sup> We need not decide whether the phrase "good reason" could be synonymous with "well-founded fear." In either event, it is clear from the standards applied to Cardoza-Fonseca's claim, as well as from its position in *Lam*, in *Acosta*, in its briefs, and at oral argument, that the Board did not apply the "well-founded fear" standard.

In Arguello-Salguera's case the Board cited both the asylum section, section 208(a), and the prohibition against deportation section, section 243(h), but articulated only one standard of proof, the stricter "clear probability" standard. It then considered whether the petitioner had demonstrated that she "would" be persecuted. Without any explanation, it concluded that she did not have "a fear of persecution" and had not demonstrated that "she would be singeled (sic) out for persecution." The government's appellate brief in this case concedes that the Board applied the same strict standard to both of the petitioner's claims and argued once again that "the BIA's determination that the burden of proof in asylum and [prohibition] of deportation cases is identical should be upheld." At oral argument, counsel for the government frankly acknowledged that the Board did not apply the law of our circuit in either of the cases before us and that it continues to refuse to apply that law.

It is beyond question that under the law of our circuit, as well as others, the Board erred in applying the strict "clear probability" standard to petitioners' asylum claims. This is not an error we can remedy on appeal. "[A]n agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)); accord *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539 (1981); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This rule applies to decisions by the Board of Immigration Appeals just as it applies to other

agency determinations. See *Phinpathya v. INS*, 673 F.2d 1013, 1020 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 584 (1984); *Patel v. INS*, 638 F.2d 1199, 1201 (9th Cir. 1980); *Castillo-Felix v. INS*, 601 F.2d 459, 462 n.6 (9th Cir. 1979); *Waziri v. INS*, 392 F.2d 55, 57 (9th Cir. 1968).

We do not believe that we should attempt to apply the "well-founded fear" standard to the instant claims before the Board has performed that task itself. Cases in which the Board applies too strict a standard and denies relief on that basis must be returned to the Board for reconsideration and not adjudicated *de novo* by the courts. Accordingly, we reverse and remand the Board's determinations regarding the asylum claims so that the Board may evaluate those claims under the proper legal standard.

### III. ARGUELLO-SALGUERA'S SECTION 243(h) CLAIM

The immigration judge observed Arguello-Salguera over the course of three deportation hearings and explicitly determined both that she was credible and that her evidence was sufficient to establish both a well-founded fear and a clear probability of persecution. Nevertheless, the Board rejected her claims. In doing so, the Board merely restated what Arguello-Salguera's evidence consisted of, and what sorts of facts she had not established. We cannot determine from its opinion whether, despite the immigration judge's express credibility findings, the Board found that Arguello-Salguera's story was not credible, or whether it accepted her testimony as truthful and believable but nevertheless found the evidence legally insufficient to establish a clear probability of persecution.

As the government points out, the Board has the power to review the record *de novo* and make its own findings of fact. See *Noverola-Bolaina v. INS*, 395 F.2d 131 (9th Cir. 1968). The Board also has the right to disagree with the immigration judge's credibility findings. See *McMullen*, 658 F.2d at 1318. Similarly, the Board may determine that the evidence is legally insufficient, despite an immigration judge's contrary determination.

Nevertheless, in order for us properly to review the Board's determination, we must understand the basis for its decision and how it arrived at the findings underlying that decision. See *Conteras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981). If the findings of the immigration judge and the Board conflict, we will consider the judge's findings as well as the Board's. *McMullen*, 658 F.2d at 1318 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), for the proposition that evidence in support of the Board's conclusion may be considered less persuasive if examiner who observed witness drew conclusions different than Board's); *cf. Saballo-Cortez v. INS*, 761 F.2d 1259, 1266 (9th Cir. 1985) (we defer to immigration judge's negative credibility findings if supported by the record). However, we cannot tell how to view the credibility issue nor can we properly determine whether the Board's decision is supported by substantial evidence, see *Bolanos-Hernandez*, 749 F.2d at 1320 n.8; *Saballo-Cortez*, 761 F.2d at 1262, unless we understand the Board's findings and its reasons for denying relief.

Because we cannot determine from the Board's opinion whether its conclusion that Arguello-Salguera failed to satisfy the requirements for relief under

16a

section 243(h) was based on its independent, implicit negative credibility findings or reflected some legal determination it made after accepting the immigration judge's credibility findings, we must remand her prohibition against deportation claim for clarification of the Board's opinion.

REVERSED AND REMANDED

17a

APPENDIX B

BOARD OF IMMIGRATION APPEALS  
Washington, D.C. 20530

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File: A24 420 980--San Francisco

In re: LUZ MARINA CARDOZA-FONSECA

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IN DEPORTATION PROCEEDINGS

APPEAL

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[Filed: Sept. 21, 1983]

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CHARGE:

Order:

Sec. 241(a)(2), I&N Act [8 U.S.C. 1251(a)(2)]—Nonimmigrant—remained longer than permitted

APPLICATION: Asylum; withholding of deportation

The respondent appeals from a decision of an immigration judge dated December 14, 1981, finding her deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) and denying her application for asylum and withholding of deportation under section 208(a) and



243(h) of the Act, 8 U.S.C. 1158(a) and 8 U.S.C. 1253(h). The appeal will be dismissed.

The respondent is a 33-year-old native and citizen of Nicaragua who, at deportation proceedings conducted on December 14, 1981, conceded deportability under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), as a nonimmigrant who had remained longer than permitted. We find that deportability has been established by clear, convincing, and unequivocal evidence as required by *Woodby v. INS*, 385 U.S. 276 (1966), and 8 C.F.R. 242.14(a). The only issue presented on appeal is the respondent's eligibility for temporary withholding of deportation and political asylum.

The law is well-settled that an applicant bears the burden of proof in asylum and section 243(h) proceedings to establish that her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. See section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A); section 243(h) of the Act; *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5 Cir. 1982); *Fleurinor v. INS*, 585 F.2d 129 (5 Cir. 1978); *Matter of Exilus*, Interim Decision 2914 (BIA 1982); *Matter of Lam*, Interim Decision 2857 (BIA 1981); *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973).

On appeal, the respondent asserts that the immigration judge applied the wrong legal standard in arriving at his decision that she had failed to sustain her burden of proving a likelihood of persecution in Nicaragua. She relies on the case of *Stevic v. Sava*, 678 F.2d 401 (2 Cir. 1982), to support her contention that the appropriate legal standard for sustaining an asylum claim is a "well-founded fear of persecution" rather than a "clear probability of persecu-

tion". She asserts that pursuant to the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (September 1979), an alien who demonstrates a genuine, subjective fear of persecution, based on some objective evidence, has established a well-founded fear of persecution. The *Handbook* is also cited as authority for her contention that her fear of persecution need not necessarily be based on her own personal experiences but may instead be based on what happened to her brother, Orlando Cardozo Fonseca. The respondent maintains that the evidence and testimony presented to the immigration judge relating to her brother's extensive political problems with the Sandinistas and her close identification with him, demonstrate a well-founded fear of persecution. She urges that the immigration judge's decision be reversed and asylum as well as temporary withholding of deportation be granted.

At her deportation hearing, the respondent alleged that she feared persecution and reprisal in Nicaragua based on her brother's numerous problems with the Sandinistas. The respondent's brother testified at the hearing that during Somoza's regime he was an active participant in the Sandinista's struggle to power. He stated that as the second in command in his area he was responsible for the organization and training of Sandinista supporters in Mexico, Costa Rica, Honduras and Panama and that many of these supporters are now in jail. For some unexplained reason, the respondent's brother claimed that he was denounced by his fellow Sandinistas and thus brought to the attention of Somozan officials. As a result of this denouncement he was falsely accused of killing a general and imprisoned and interrogated by Somozan officials, first in 1969, and then in 1971, 1973, and

1978. During the 1978 interrogation, which lasted 18 days, the respondent's brother informed the Somozan officials that he no longer sympathized with the Sandinistas since they appeared to be leaning towards Communism, a doctrine he did not espouse. It is claimed that his captors applied various methods of torture to him, including electric shocks to his eyes and genitals.

The respondent's brother testified that he had submitted an application for asylum. Attached to this application was an article from *La Frensa*, a Nicaraguan newspaper, dated March 28, 1978, which recounts his seizure by government officials on March 10th and his subsequent disappearance. Although he indicated that both his father-in-law and brother-in-law were in prison and that he feared for his own safety, the respondent's brother admitted that he returned to Nicaragua in 1980 for approximately 15 days in order to see his family. He maintained that his visit was clandestine and that his only movements were at night. He further contended that during his 15 day sojourn in Nicaragua, someone approached his home on at least two occasions and requested information as to his whereabouts.

The respondent's brother testified that he feared for the respondent's safety if she returns to Nicaragua. He indicated that he believed the Sandinistas would imprison and interrogate her in order to locate him, especially since they are aware that she and her brother fled Nicaragua together.

The respondent verified her brother's history of imprisonment and political problems with the Sandinistas. She maintains that although she herself has not taken any actions against the Sandinistas, her brother's actions will count against her. She claims

that her sister, who remains in Nicaragua, has urged her not to return home because the Sandinistas are looking for their brother. She asserts that if she returned home she, too, would be placed in jail and tortured.

Upon consideration of the record as a whole, we agree with the immigration judge that the respondent has failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act. Our conclusion as to the respondent's claim is the same whether we apply a standard of "clear probability", "good reason", or "realistic likelihood". See *Rejaie v. INS*, 691 F.2d 139 (3 Cir. 1982); *Stevic v. Sava*, *supra*. *Matter of Martinez-Romero*, Interim Decision 2872 (BIA 1981). We recognize the difficulty an individual may face in establishing that she will be persecuted. We are also aware of the political upheaval and general anarchy existing in Nicaragua. However, generalized, undocumented assertions of persecution, standing alone are not sufficient to establish eligibility for asylum or withholding of deportation. See *Rejaie v. INS*, *supra*; *Kashani v. INS*, 547 F.2d 376 (7 Cir. 1977); see also *Moghanian v. BIA*, 577 F.2d 141 (9 Cir. 1978); *Pereira-Diaz v. INS*, 551 F.2d 1149 (9 Cir. 1977). Similarly, general allegations of political upheaval which affect the populace as a whole are insufficient for such relief. *Fleurinor v. INS*, *supra*; *Matter of Diaz*, 10 I&N Dec. 199 (BIA 1963).

The respondent has failed to support, through objective evidence, her generalized assertion that she will be subject to persecution based on her brother's political problems with the Sandinistas. Even assuming her brother's recital of his treatment at the hands



of the Sandinistas to be true, it is the respondent's case which is now before us, not her brother's. The respondent has openly admitted that she herself has taken no actions against the Nicaraguan government. She admits that she has never been politically active. She testified that she never assisted her brother in any of his political activities. Moreover, she admits that she has never been singled out for persecution by the present government. Thus, her sole basis for requesting asylum is that the Sandinistas will associate her with her brother and attempt to use her to retaliate against him.

We note that the respondent's sister who remains in Nicaragua, has not been harmed by the Sandinistas. In fact, the respondent stated in her asylum application that no member of her family has suffered or been intimidated because of her actions. We are unpersuaded that the respondent's fears of retaliation, based solely on her claimed close relationship to her brother and her flight from Nicaragua with him, amount to anything more than mere speculation.

On the basis of the record, we are satisfied that the respondent has not shown that she will be persecuted or that she has a well-founded fear of persecution within the contemplation of section 208(a) or 243(h) of the Act. Consequently, the respondent's appeal from the denial of her application for asylum under section 243(h) of the Act will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that

time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ David L. Milhollan  
Chairman



## APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE  
Immigration and Naturalization Service

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File: A24 420 980—San Francisco, California

In the Matter of

LUZ MARINA CARDOZA-FONSECA, RESPONDENT

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Dec. 14, 1981

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IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act—Section 241(a)(2)—nonimmigrant remained longer

APPLICATION: Asylum and 243(h) or voluntary departure

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old single female native citizen of Nicaragua. She entered the United States at Miami, Florida on or about June 25, 1979 as a visitor until September 30, 1979. She was granted the privilege of departing the United States voluntarily on or before September 28, 1980. She failed to depart.

Deportability has been conceded and I find that the respondent is deportable as charged. The respondent has applied for asylum and 243 relief or voluntary departure as an alternative remedy. Her claim to persecution is basically founded on that of her brother who has an asylum application before the District Director. His application is on the record as part of hers. See Exhibit 2.

The brother, Orlando Cardoza Fonseca, was called as a witness at this hearing. He testified that he was arrested, interrogated and tortured in 1969, 1971, 1973 and 1978 by the government authorities then in power in Nicaragua, that is the Somoza regime. He claims that he received electric shock through his eye and genitals in an effort to make him speak out. The last time when he was imprisoned, he was in prison for 18 days. He was at that time a member of the Sandinista movement but claims that he is no longer involved with that party or sympathetic to its ends. He feels that he would be persecuted because he was turned in, in 1978 by fellow members of the Sandinista movement to the Somoza regime. It is unclear why this happened or whether these persons were in fact sympathetic to the Sandinista movement. He therefore believes that the Sandinistas would persecute him if he returned to Nicaragua. He claims that his wife has recently been called upon by the

Sandinista authorities and questioned as to his whereabouts. He, however, also testified he returned to Nicaragua last year and visited with his family for two weeks. He further testified that he was there incognito.

Two of his relatives are presently imprisoned in Nicaragua. They were members of the Somoza government. While last in prison he stated that he was no longer in sympathy with the Sandinistas to his interrogators. He also feels that this may have been disclosed to the Sandinista regime which would further cause him to be persecuted if he returned to his country.

I am reluctant to pass on the strength of the brother's application for asylum since that is not before me at this time. His parents, two sisters, his wife and two children, all [*sic*] of them have been arrested or interrogated.

The real question is whether the respondent is likely to be persecuted if returned to her native country. An alien qualifies for asylum under the Refugee Act of 1980 if it is established that he or she is a refugee within the meaning of Section 101(a)(42)(A) of the Immigration and Nationality Act, that is that he or she has a well-founded fear of persecution in the country of his or her nationality or the country where he or she last resided, on account of race, religion, nationality, membership in a particular social group or political opinion. Of necessity, finding that an alien's life or freedom would be threatened under section 243(h) would lead to the conclusion that they are also likely to be persecuted or that they have a well-founded fear of persecution in that country for asylum purposes.

Respondent's testimony is that she was a nonpolitical person. Nonetheless she feels that she would be interrogated and possibly tortured because of her brother's activity. Her sisters warned her not to return to her country because the Sandinistas are looking for the brother who was a witness at her hearing today.

Without making a determination as to the strength of the brother's application for asylum, it is my conclusion that the respondent, based on the brother's application for asylum, has not demonstrated sufficient evidence in support of her claim of persecution. It is necessary for the respondent under her circumstances to show a clear probability of persecution directed to her individually or to a class to which she belongs. There is no evidence of any substance in the record other than her brother's claim to asylum in the form of his application and a newspaper article covering his imprisonment in 1978.

None of the evidence indicates that the respondent would be persecuted for political beliefs, whatever they may be, or because she belongs to a particular social group. She has not proven that she or any other members of her family, other than her brother, has been detained, interrogated, arrested and imprisoned, tortured and convicted and sentenced by the regime presently in power in Nicaragua.

I find that she has failed to demonstrate that she is entitled to political asylum or relief pursuant to section 243(h). Accordingly her application for relief is hereby denied. The respondent has in the alternative applied for voluntary departure. There appears to be no reason why she should not be given that form of relief.



IT IS ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure on or before March 14, 1982, without expense to the Government or any extension beyond that date as may be granted by the District Director under the conditions he may set.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceeding and the following order shall thereupon become immediately effective: The respondent shall be deported from the United States to Nicaragua on the charge contained in the Order to Show Cause.

June 1, 1982

/s/ Bernard J. Hornbach  
BERNARD J. HORNBACK  
United States Immigration Judge

# APPENDIX D

EXECUTIVE OFFICE FOR  
IMMIGRATION REVIEW  
Board of Immigration Appeals  
Falls Church, Virginia 22041

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File: A24 159 781—New Orleans

In re: GILBERTO ACOSTA-SOLORZANO

IN DEPORTATION PROCEEDINGS

APPEAL

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Mar. 1, 1985

## CHARGE:

Order: Sec. 241(a)(2), I&N [8 U.S.C. § 1251  
(a)(2)]—Entered without inspection

APPLICATION: Asylum and withholding of deportation

BY: Milhollan, Chairman; Maniatis, Dunne, Morris,  
and Vacca, Board Members

In a decision dated December 22, 1983, the immigration judge found the respondent deportable pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2), for entering the United States without inspection, denied the respondent's applications for a grant of asylum and for withholding of deportation to El Salvador, but granted the respondent the privilege of departing voluntarily in lieu of deportation. The respondent has appealed from that portion of the immigration judge's decision denying the applications for asylum and withholding of deportation. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of El Salvador. In a deportation hearing held before an immigration judge over the course of two days in July and August 1983, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. The respondent sought relief from deportation by applying for a discretionary grant of asylum pursuant to section 208 of the Act, 8 U.S.C. § 1158, and for mandatory withholding of deportation to El Salvador pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h).<sup>1</sup> In an oral decision, the immigration judge denied the respondent's applications for these two forms of relief finding that he had failed to meet his burden of proof for such relief. It is this finding that the respondent has challenged on appeal.

<sup>1</sup> Under the regulations of the Immigration and Naturalization Service, any asylum request made after the institution of deportation proceedings is also considered to be a request for withholding of deportation under section 243(h) of the Act. 8 C.F.R. § 208.3(b) (1984).

In order to be eligible for withholding of deportation to any country, an alien must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act. We have held, and the United States Supreme Court has recently affirmed, that this statutory provision requires an alien to demonstrate "a clear probability" of persecution on account of one of the five grounds enumerated in the Act. *INS v. Stevic*, — U.S. —, 104 S. Ct. 2489 (1984). The Court has construed the clear-probability standard to require a showing that it is more likely than not an alien would be subject to persecution. *Id.* at 2498.

In order to be eligible for a grant of asylum, an alien must show he or she is a "refugee" as defined by section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). See section 208 of the Act. That definition includes the requirement that an alien must have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." See section 101(a)(42)(A) of the Act. In *INS v. Stevic*, *supra*, the Supreme Court did not find it necessary to construe the meaning of the phrase "well-founded fear of persecution." Rather, the Court assumed for the purposes of analysis that the well-founded-fear standard for asylum is more generous than the clear-probability standard for withholding of deportation. *INS v. Stevic*, *supra*, at 2498.

It has been our position that as a practical matter the showing contemplated by the phrase "a well-founded fear" of persecution converges with the showing described by the phrase "a clear probability" of persecution. See *e.g.*, *Kashani v. INS*, 547 F.2d 376,



379 (7th Cir. 1977); *Matter of Dunar*, 14 I&N Dec. 310, 319-20 (BIA 1973). Accordingly we have not found a significant difference between the showings required for asylum and withholding of deportation. *Matter of Salim*, 18 I&N Dec. 311, 314 (1982); *Matter of Lam*, 18 I&N Dec. 15 (1981); accord *Matter of Portales*, 18 I&N Dec. 239, 241 (BIA 1982).

The United States Court of Appeals for the Third Circuit has agreed with this position, holding that there is no difference between the standards for asylum and withholding of deportation. *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984); see *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982). The Seventh Circuit has concluded that the well-founded-fear standard for asylum is not identical, but "very similar," to the clear-probability standard for withholding of deportation and has described the showing for asylum as one requiring actual persecution or some other "good reason" to fear persecution. *Carvajal-Munoz v. INS*, 743 F.2d 562, 574-76 (7th Cir. 1984). This position also appears to have been adopted by the Sixth Circuit. *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984). The Ninth Circuit, however, which has indicated that the well-founded-fear standard requires a "valid reason" to fear persecution, has concluded that this standard is more generous to the alien than the clear-probability standard for withholding of deportation. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1321 (9th Cir. 1984). In light of the conflicting positions over the standards controlling asylum and withholding of deportation, we shall reexamine our position on the showings required for these forms of relief.

We begin with the understanding that an alien in an exclusion or a deportation proceeding who seeks to

demonstrate eligibility for either asylum or withholding of deportation must necessarily make two related showings. First, the alien must go forward with his evidence and initially persuade the immigration judge that the facts alleged to be the basis of the claim for asylum or withholding of deportation are true, *i.e.*, the alien must meet his evidentiary burdens of proof and persuasion. See generally, E. Cleary, *McCormick's Handbook of the Law of Evidence* § 336 at 783-85 (2d ed. 1975). Second, the alien must demonstrate that the facts found to be true meet the tests of eligibility for asylum or withholding of deportation set out in the Act, *i.e.*, the alien must meet the statutory standards of eligibility for these forms of relief. See sections 208 and 243(h) of the Act.

#### THE EVIDENTIARY BURDENS OF PROOF AND PERSUASION FOR ASYLUM AND WITHHOLDING OF DEPORTATION

Case law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution. See *INS v. Stevic*, *supra*, at 2497 n.14; 3 C.F.R. §§ 208.5, 242.17(c) (1984); see also *Matter of Nagy*, 11 I&N Dec. 888, 889 (BIA 1966); *Matter of Sihasale*, 11 I&N Dec. 759, 760-62 (BIA 1966). However, to date our decisions have not articulated the burden of persuasion an alien must meet in order to convince the trier-of-fact of the truth of the allegations that form the basis of the claim for asylum or withholding of deportation.

It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence. See E.

Cleary, *supra*, § 355 at 853; 1A C. Gordon & M. Rosenfield, *Immigration Law and Procedure*, § 5.10b at 5-121 (rev. ed. 1984).<sup>2</sup> This is the burden of persuasion generally applied to aliens when they seek to prove their admissibility to the United States or when they seek relief from deportation through such means as suspension of deportation under section 244(a) of the Act, 8 U.S.C. § 1254(a), or adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. See *Matter of Vorrais*, 12 I&N Dec. 84 (BIA 1967); 1A C. Gordon & H. Rosenfield, *supra*, §§ 3.20d at 3-190, 5.10b at 5-121. We see no reason to depart from this burden of persuasion when aliens seek asylum and withholding of deportation. Thus, in such cases we consider it to be incumbent upon an alien to establish the facts supporting his claim by a preponderance of the evidence.<sup>3</sup> Cf. *Bolanos-Hernandez v. INS*, *supra*, at 1320 n.5. In determining whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and the probative force of the evidence put forward by the alien. See,

<sup>2</sup> The Service's burden of proving an alien's deportability by clear, unequivocal, and convincing evidence is an exception to this general rule. See *Woodby v. INS*, 385 U.S. 276 (1966).

<sup>3</sup> We note that in *McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981), the Ninth Circuit held that a "substantial evidence" standard of review applies in cases in which aliens seek withholding of deportation under section 243(h) of the Act. See also *Carvajal-Munox v. INS*, *supra*, at 567. The standard of review employed by a court in reviewing our decision is a separate and distinct standard from that imposed upon a party to measure his burden of persuasion on issues of fact. *Woodby v. INS*, *supra*, at 282-83. Thus, the Ninth Circuit's decision in *McMullen* has no bearing on the issue of an alien's burden of persuasion in withholding or asylum cases.

*e.g. Saballo-Cortez v. INS*, 749 F.2d 1354, 1357 (9th Cir. 1984).

In order to prove the facts underlying his applications for asylum and withholding of deportation, the respondent testified, and attested in an affidavit attached to his asylum application, to the following facts. In 1976 he, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with COTAXI, the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manager of COTAXI, the respondent continued on the weekends to work as a taxi driver.

Starting around 1978, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work-stoppages, in hopes of damaging El Salvador's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.



Beginning in about 1979, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of the respondent and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

During January and February 1981, the respondent received three anonymous notes threatening his life. The first note, which was slipped through the window of his taxi and was addressed to the manager of COTAXI, stated: "Your turn has come, because you are a traitor." The second note, which was also put on the respondent's car, was directed to "the driver of Taxi No. 95," which was the car owned by the respondent, and warned: "You are on the black list." The third note was placed on the respondent's car in front of his home, was addressed to the manager of COTAXI, and stated: "We are going to execute you as a traitor." In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has the impression, however, that COTAXI was not favored

by some government officials because they viewed the cooperative as being too socialistic.

After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

As evidence of the truth of his version of the facts, the respondent submitted a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years. The respondent also submitted several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy.

The Service did not submit any evidence refuting the respondent's testimony. As required by regulation, the Service did submit a written advisory opinion from the Bureau of Human Rights and Humanitarian Affairs in the Department of State pertaining to the respondent's request for asylum in the United States (Form I-589). See 8 C.F.R. §§ 208.7, .10(b). That opinion states that the respondent does not appear to qualify for asylum because he failed to show a well-founded fear of persecution in El Salvador on account of race, religion, nationality, membership in a particular social group, or political opinion.

The immigration judge found the respondent's testimony sufficient to prove that he was a founder and

member of COTAXI but insufficient to prove that he had received several death threats and had been assaulted by guerrillas. The immigration judge did not make any finding that the respondent lacked credibility; rather, he rejected a substantial portion of the respondent's testimony solely because it was self-serving.

While the immigration judge's assessment of the evidence deserves deference, we disagree with his conclusion that the respondent's testimony should be rejected solely because it is self-serving. The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerrilla-sponsored work stoppages. Moreover, the respondent submitted objective evidence to establish his membership in COTAXI and to corroborate his testimony that the guerrillas sought to disrupt the public transportation system of El Salvador. Thus, absent an adverse credibility finding by the immigration judge, we find the respondent's testimony, which was corroborated by other objective evidence in the record, to be worthy of belief. It remains to be determined, however, whether the respondent's facts are sufficient to meet the statutory standards of eligibility for asylum and withholding of deportation.

#### THE STATUTORY STANDARD FOR ASYLUM

A grant of asylum is a matter of discretion. See section 208 of the Act; *INS v. Stevic*, *supra*, at 2497-98 n.18. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a

"refugee" under section 101(a)(42)(A) of the Act. Therefore, that section establishes the statutory standard of eligibility for asylum. The pertinent portion of section 101(a)(42) provides as follows:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, . . . . The term "refugee" does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a "fear" of "persecution;" (2) the fear must be "well-founded;" (3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion;" and (4) the alien must be unable or unwilling to return to his country or nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.<sup>4</sup>

<sup>4</sup> While the language of section 101(a)(42)(A) excludes from the definition of a refugee any person who "ordered, incited, assisted, or otherwise participated in the persecution of any person," we do not construe this language as estab-



(1) *The alien must have a "fear" of "persecution."*

Initially, we note that Congress added the elements in the definition of a refugee to our law by means of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 197. In so doing Congress intended to conform the Immigration and Nationality Act to the United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ("the Protocol"), to which the United States had acceded in 1968. H.R. Rep. No. 781 (Conference Report), 96th Cong., 2d Sess. 19, reprinted in 1980 U.S. Code Cong. & Ad. News 160, 160; S. Rep. No. 256, 96th Cong., 1st Sess. 4, 14-15 reprinted in 1980 U.S. Code Cong. & Ad. News 141, 144, 154-55; H.R. Rep. No. 608, 96th Cong., 1st Sess. 9-10 (1979); see also *INS v. Stevic*, *supra* at 2497. Article 1.2 of the Protocol<sup>5</sup> defines a refugee as one who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

lishing a fifth statutory element an alien must initially prove before he qualifies as a refugee. This provision is one of exclusion, not one of inclusion, and thus requires an alien to prove he did not participate in persecution only if the evidence raises that issue.

<sup>5</sup> Article 1.2 of the Protocol largely incorporated the definition of a refugee contained in Article 1A(2) of the United Nations Convention Relating to the Status of Refugees (the U.N. Convention), July 28, 1951, to which the United States was not a party. See 19 U.S.T. 6225, 6261.

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

19 U.S.T. 6225, 6261.<sup>6</sup>

Since Congress intended the definition of a refugee in section 101(a)(42)(A) of the Act to conform to the Protocol, it is appropriate for us to consider various international interpretations of that agreement. However, these interpretations are not binding upon us in construing the elements created by the section 101(a)(42)(A) of the Act, for the determination of who should be considered a refugee is ultimately left by the Protocol to each state in whose territory a refugee finds himself. See Young, *Between Sover-*

<sup>6</sup> Despite Congress' intention to conform our law to the Protocol, the actual definition of "refugee" adopted in the Act differs in several significant respects from that in the Protocol and the U.N. Convention. First, the U.N. Convention excludes from all of its provisions several groups of persons: (1) those who have committed crimes against humanity; (2) those who have committed a serious non-political crime; and (3) those who are guilty of acts contrary to the principles of the United Nations. Article 1F of the U.N. Convention. 19 U.S.T. 6263, 6264. Thus, these groups are not eligible for refugee status under the U.N. Convention or the Protocol. The language in section 101(a)(42)(A) of the Act does not contain this exclusion.

Second, in a provision that does not pertain to grants of asylum, Congress provided that a person may qualify as a refugee even if he is still inside his country of nationality or of habitual residence so long as he has been specially designated by the President. Section 101(a)(42)(B) of the Act. Neither the Protocol nor the U.N. Convention definition of "refugee" reaches persons still within the borders of their own countries. Martin, *The Refugee Act of 1980: Its Past and Future*, Transnational Legal Problems of Refugees: 1982 Mich. Y.B. Int'l. Legal Stud. 91, 101-103 (1982).

eigns: *A Reexamination of the Refugee's Status*, Transnational Legal Problems of Refugees: 1982 Mich. Y.B. Int'l. Legal Stud. 399, 344-45 (1982); Office of the United Nations High Commissioner for Refugees, *The Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 1, 3-4 (Geneva, 1979) ("Handbook"); *INS v. Stevic*, *supra*, at 2500 n.22.

In adding the definition of a refugee to the Act, Congress did not identify what one must show in order to establish a "fear of persecution." The phrase "fear of persecution" is not new to the Act. Prior to 1980, it appeared in former section 203(a)(7), which provided for the conditional admission to the United States of certain aliens if they fled a country because of persecution or "fear of persecution." See 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(c)(3), 94 Stat. 102, 107).<sup>7</sup> Former section 203(a)(7) was applied by Service officers in allocating visas to immigrants abroad and by district directors in determining eligibility for adjustment of status under section 245 of the Act. See *e.g.* *Matter of Ugricic*, 14 I&N Dec. 384 (D.D. 1972); *Matter of Adamska*, 12 I&N Dec. 201 (R.C. 1967). Immigration judges and the Board were without authority to decide applications brought under former section 203(a)(7) and

<sup>7</sup> Specifically, former section 203(a)(7) allowed 17,400 persons each year to be conditionally admitted to the United States if they could demonstrate that: (1) they had fled from a Communist or Communist-dominated country, or from any country in the Middle East and (2) they had fled these countries because of persecution or fear of persecution. See former section 203(a)(7) of the Act.

accordingly the meaning of the phrase "fear of persecution" was never directly at issue, or construed, in proceedings before the Board. See *Matter of Guiragossian*, 17 I&N Dec. 161, 163 (BIA 1979).

"Fear" is a subjective condition, an emotion characterized by the anticipation or awareness of danger. Webster's Third New International Dictionary (Unabridged) 831 (16th ed. 1971). The Office of the United Nations High Commissioner for Refugees (UNHCR) has suggested in the *Handbook* that the definition of a refugee found in the Protocol requires fear to be a person's primary motivation for seeking refugee status. See *Handbook*, *supra*, at 11-12. While we do not consider the UNHCR's position in the *Handbook* to be controlling,<sup>8</sup> the *Handbook* neverthe-

<sup>8</sup> The *Handbook* was issued in September 1979, whereas hearings on the Refugee Act were held in March and May 1979, and the Senate Judiciary Committee issued its report in July 1979. Thus, it is highly unlikely that Congress consulted the *Handbook* while drafting the definition of a refugee in the Refugee Act of 1980. But see, "Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David W. Crosland, General Counsel, INS," *United States Refugee Program, Oversight Hearings before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 26 (1981) (assuming Congress was aware of the criteria articulated in the *Handbook* at the time of passage of the Refugee Act in 1980, but nonetheless concluding the *Handbook* is only a guideline).

In addition, the jurisdiction of the UNHCR has been expanded over the years and now encompasses large groups of persons displaced by civil strife or natural disasters who simply do not qualify under the Protocol's limited definition of a "refugee." Special Project, *Displaced Persons: "The New Refugees"*, 13 Ga. J. Int'l. and Comp. Law 755, 763-71 (1983) and authorities cites [sic] therein. Thus, it cannot be certain to what extent the position in the *Handbook* reflects



less is a useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol.

Given the prominence of the word "fear" in the definition of a refugee created by Congress, and given the *Handbook's* persuasive assessment in this instance that "fear" should be a refugee's primary motivation, we conclude that an alien seeking to qualify under section 101(a)(42)(A) of the Act must demonstrate that his primary motivation for requesting refuge in the United States is "fear," i.e., a genuine apprehension or awareness of danger in another country. No other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, satisfies the definition of a refugee created in the Act.

Prior to 1980 "persecution" was construed to mean either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive. *See, e.g., Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Matter of Maccaud*, 14 I&N Dec. 429, 434 (BIA 1973); *Matter of Dunar*, 14 I&N Dec. 310, 320 (BIA 1973); *Matter of Diaz*, 10 I&N Dec. 199, 200 n.1 (BIA 1963); *see also Matter of Laipenieks*, 18 I&N Dec. 433, 456-57 (BIA 1983).<sup>9</sup> The harm or suffering inflicted

concepts that are outside the strict definition of a "refugee" under the Protocol. *See* page [5 a], *infra*.

<sup>9</sup> The word "persecution" appeared not only in former section 203(a)(7) but also in the predecessors to the present withholding of deportation provision in section 243(h) of the Act and in the regulatory provisions pertaining to grants of asylum. *See INS v. Stevic, supra*, at 2493 and nn.6, 7; 8 C.F.R. § 108 (1980). Prior to 1980, it was construed by us and by the courts primarily in the latter two contexts.

could consist of confinement or torture. *See Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir. 1961). It also could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom. *See, e.g., Dunat v. Burney*, 297 F.2d 744, 746 (3d Cir. 1962); *Matter of Salama*, 11 I&N Dec. 536 (BIA 1966); *Matter of Eusaph*, 10 I&N Dec. 453, 454 (BIA 1966). Generally harsh conditions shared by many other persons did not amount to persecution. *See Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Prosecution for violating travel restrictions and laws of general applicability did not constitute persecution, unless the punishment was imposed for invidious reasons. *See Soric v. INS*, 346 F.2d 360, 361 (7th Cir. 1965); *Matter of Janus and Janek*, 12 I&N Dec. 866, 876 (BIA 1968).

Two significant aspects of this accepted construction of the term "persecution" were as follows. First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome. *See, e.g. Matter of Diaz, supra*, at 204. Thus, physical injury arising out of civil strife or anarchy in a country did not constitute persecution. *Id.* at 203. Second, harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control. *See e.g. McMullen v. INS, supra*, at 1315 n.2; *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Matter of McMullen*, 17 I&N Dec. 542, 44-45 (BIA 1980); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975).

We conclude that the pre-Refugee Act construction of "persecution" should be applied to the term as it appears in section 101(a)(42)(A) of the Act. It is

a basic rule of statutory construction that words used in an original act or section, that are repeated in subsequent legislation with a similar purpose, are presumed to be used in the same sense in the subsequent legislation. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); see 1A Sands, Sutherland on Statutory Construction, § 22.33 (4th ed. 1972). Thus, we presume that Congress, in using the term "persecution" in the definition of a refugee under section 101(a)(42)(A) of the Act, intended to adopt the judicial and administrative construction of that term existing prior to the Refugee Act of 1980. *Id*; see *Commissioner of Internal Revenue v. Noel's Estate*, 380 U.S. 678, 681 (1965). Cf. *McMullen v. INS*, *supra*, at 544-45. Our presumption is reinforced by the fact that in 1978, two years before enacting the Refugee Act of 1980, Congress chose not to define the word "persecution" when using it in other provisions of the Act because the meaning of the word was understood to be well-established by administrative and court precedents. See *Matter of Laipenieks*, *supra*, at 456.

As was the case prior to enactment of the Refugee Act, "persecution" as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. The word does not embrace harm arising out of civil strife or anarchy: in fact, Congress specifically rejected a definition of a refugee that would have included "displaced persons," *i.e.*, those who flee harm generated by military or civil disturbances.<sup>10</sup> This construction is consistent with

<sup>10</sup> The Senate bill contained a definition of "refugee" that included "displaced persons" and referred, in part, to "any person who has been displaced by military or civil disturbance

the international interpretation of "refugee" under the Protocol, for that term does not include persons who are displaced by civil or military strife in their countries of origin. See Special Project, *supra* note 8, at 763-69, and authorities cited therein.

In the case before us, we find that the respondent has adequately established that his primary motivation for seeking asylum is fear of persecution. We must now consider whether it has been demonstrated that this fear is well founded and whether the other elements necessary to establish eligibility for asylum have been satisfied.

(2) *The fear of persecution must be "well-founded."*

In 1973 in *Matter of Dunar*, we construed the meaning of "well-founded fear of persecution," as that phrase is used in the Protocol, as follows:

[T]he requirement that the fear is "well-founded" rules out an apprehension which is purely subjective. . . . Some sort of showing must be made and this can ordinarily be done only by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; *but the crucial question is whether the testimony, if accepted as true, makes*

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or uprooted because of arbitrary detention" who is unable to return to "his usual place of abode." See S.643, 96th Cong., 1st Sess. § 201(a) (1979); S. Rep. No. 96-256, *supra*, at 4. The House bill did not contain such a provision. See H.R. 2816, 96th Cong., 1st Sess. § 201(a) (1979). The conference committee adopted the House version, thereby rejecting a definition of "refugee" that included "displaced persons." See H.R. Rep. 96-781, *supra*, at 19; see also section 101(a)(42)(A) of the Act.



out a realistic likelihood that he will be persecuted. . . .

*Matter of Dunar*, *supra*, at 319 (emphasis added). Our construction of the Protocol's well-founded-fear standard was accepted by the courts and thereafter "a well-founded fear" of persecution was understood to mean that an alien had to produce objective evidence showing a likelihood or probability of persecution. See *INS v. Stevic*, *supra*, at 2495-96 and n.12 and cases cited therein; *Kashani v. INS*, *supra*, at 379. Thus, during 1979 and 1980, the years in which Congress drafted, considered, and enacted the definition of "refugee" in section 101(a)(42)(A) of the Act, the accepted administrative and judicial construction in this country of the well-founded-fear standard was one that linked this standard to objective facts, as opposed to purely subjective fear, and to the likelihood of persecution. See *id.*

Congress did not indicate in the legislative history of the Refugee Act of 1980 that it intended to alter the accepted construction of "a well-founded fear of persecution" by using this phrase in the definition of a refugee in section 101(a)(42)(A) of the Act. Moreover, the pre-Refugee Act construction of "a well-founded fear of persecution" is nearly identical to that proposed by the authority on international refugee law, Atle Grahl-Madsen, in his treatise on the meaning of the U.N. Convention and the Protocol:

The adjective 'well-founded' suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a more objective yardstick. . . .

We cannot find a meaningful denominator in the minds of refugees. We must seek it in the condi-

tions prevailing in the country whence they have fled.

'Well-founded fear of being persecuted' may therefore be said to exist, if it is likely that the person concerned will become the victim of persecution if he returns to his country of origin.

... [T]he real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded.'

1 A. Grahl-Madsen, *The Status of Refugees in International Law*, §§ 76, 77 at 173, 175, 181 (1966) (emphasis added). Lastly, the pre-Refugee Act construction of "a well-founded fear of persecution" is consistent with the intention of the drafters of the U.N. Convention, for by the use of this language the drafters were seeking to introduce an objective, as opposed to a purely subjective, test for the determination of refugee status. 1 A. Grahl-Madsen, *supra*, § 78 at 179.<sup>11</sup>

<sup>11</sup> The committee that drafted the phrase, "a well-founded fear of persecution," in the U.N. Convention defined the phrase to mean that a person actually must have been a victim of persecution or be able to show "good reason" why he fears persecution. *Matter of Dunar*, *supra*, at 319. That committee considered various proposals defining refugee status in terms of being unwilling to return to one's country of origin because of "serious apprehension based on reasonable grounds of . . . persecution," or a "justifiable fear of persecution," or a "fear of persecution," before selecting the term "well-founded" to describe the nature of the fear that qualified one as a refugee. United Nations Document E/AC.32/L.2 (17 January 1950); United Nations Document E/AC.32/L.3 (17 January 1950)

Since there is no indication that Congress intended to depart from the accepted judicial and administrative construction of "a well-founded fear of persecution" and since this construction is consistent with the U.N. Convention and the Protocol, we see no valid reason for departing from the construction of the well-founded-fear standard that prevailed in this country prior to the Refugee Act of 1980. Accordingly, we continue to construe "a well-founded fear of persecution" to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.

As has always been the case, our construction of the well-founded-fear standard reflects two fundamental concepts. The first is that in order to be "well-founded," an alien's fear of persecution cannot be

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at 1 and 2; United Nations Document E/AC.32/L.4 and Add.1. In addition, the committee was guided by prior international agreements pertaining to refugees, one of which was the Constitution of the International Refugee Organization (IRO). United Nations Economic and Social Council, *Report of the Ad-Hoc Committee on Statelessness and Related Problems*, February 17, 1950, at 37 (E/1618; E/AC.32/5). The IRO Constitution provided that refugees and displaced persons became the concern of the IRO if, *inter alia*, they had valid objections to returning to their countries of origin, such as "persecution or fear, based on reasonable grounds of persecution." Constitution of the International Refugee Organization, Part I, §§ A, B, C.1(a) (i), 62 Stat. 3037, ratified by United States on December 16, 1946 (T.I.A.S. No. 1846) effective August 30, 1948); 1948 U.S. Code Cong. Service 2042, 2051-52. Thus, we conclude that in using the phrase "well-founded fear of persecution," the drafters of the U.N. Convention were attempting to create an objective measure of the fear of persecution.

purely subjective or conjectural, it must have a solid basis in objective facts or events. *Compare Matter of Martinez-Romero*, 18 I&N Dec. 75, 79 (BIA 1981) (an alien did not show a well-founded fear of persecution because there were no objective facts supporting his claim to asylum) *with Matter of Dunar, supra*, at 319 (a showing of a well-founded fear of persecution rules out a purely subjective apprehension and requires a showing to be made by objective evidence). This concept, after all, is consistent with the generally understood meaning of the term "well-founded," which refers to something that has a firm foundation in fact or is based on excellent reasoning, information, judgment, or grounds. *See Webster's Third New International Dictionary, supra*, at 2595.

The second fundamental concept that is, and always has been, reflected in our construction of "a well-founded fear of persecution" is that in order to warrant the protection afforded by a grant of refuge, an alien must show it is likely he will become the victim of persecution. *Compare Matter of Salim, supra*, at 313-15 (an alien established eligibility for asylum and met the well-founded fear standard because she showed the requisite "likelihood" of persecution) *with Matter of Dunar, supra*, at 319 (the crucial question under the well-founded fear standard is whether a person has shown a realistic "likelihood" of persecution). Since language by its nature is inexact, we have used such words as "likelihood," or "realistic likelihood," or even "probability" of persecution to express this concept. *See, e.g., Matter of Salim, supra; Matter of Dunar, supra*. By use of such words we do not mean that "a well-founded fear of persecution" requires an alien to establish to a particular degree of certainty, such as a "probabil-



ity" as opposed to a "possibility," that he will become a victim of persecution. Rather, as a practical matter, what we mean can best be described as follows: the evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. The first of these factors is inherent in the showing that the conduct the alien fears amounts to "persecution" under the Act, *i.e.*, the infliction of suffering or harm in order to punish an alien because he differs in a way a persecutor deems offensive and seeks to overcome. The second, third, and fourth factors are all indispensable in showing that there is a real chance an alien will become a victim of persecution, for if the persecutor is not aware or could not easily become aware that an alien possesses the characteristic that is the basis for persecution, or if the persecutor lacks the capability to carry out persecution, or if the persecutor has no inclination to punish the particular alien, then it cannot reasonably be found that the alien is likely to become the persecutor's victim. The issue of whether an alien's facts demonstrate these four factors is one that ordinarily must be decided on a case-by-case basis, for the question of what kinds of facts show a likelihood of persecution ultimately depends upon each alien's own particular situation. "[T]he likelihood of becoming a victim of persecution may vary from person to person. For example, a well-known personality may be more exposed to persecution than a person who has always

remained obscure. . . . therefore [it is] necessary to assess the situation of each person on its own merits."

1 A. Grahl-Madsen, *supra*, § 76 at 175.

To date the courts have not agreed upon a common description of the well-founded-fear standard in section 101(a)(42)(A) of the Act. The Third Circuit has essentially adopted our language and concluded that "a realistic likelihood" of persecution accurately describes the well-founded-fear standard. *Compare Rejaie v. INS, supra*, at 146 with *Matter of Dunar, supra*, at 319. The Sixth, Seventh, and Ninth Circuits, on the other hand, appear to have chosen the language "good reason" or "valid reason" to fear persecution to describe this standard. *Bolanos-Hernandez v. INS, supra*, at 1322; *Youkhanna v. INS, supra*, at 362; *Carvajal-Munoz v. INS, supra*, at 574, 576, 577; *see also, Stevic v. Sava, 618 F.2d 401, 405-06 (2d Cir. 1982), rev'd on other grounds, INS v. Stevic, supra*. We think that on their face descriptions such as "good reason" or "valid reason" to fear persecution do not adequately describe the well-founded-fear standard. To the extent that such words could be interpreted to mean that an alien's fear of persecution need only be plausible, they do not reflect the generally understood meaning of "well-founded." *See* page [51a], *supra*. Nor do these words reflect the understanding of Congress, and the meaning of the Protocol, that an alien must show it is likely he will become a victim of persecution before he is eligible for refuge. *See* pages [48a-49a], *supra*.

Moreover, as a practical matter, we are not certain that these descriptions most accurately describe the analysis used by the courts when ascertaining whether an alien's fear of persecution is "well-founded." No matter how the courts have described the well-

founded-fear standard, they have required an alien to come forward with more than his purely subjective fears of persecution; he has been required to show that his fears have a sound basis in personal experience or in other external facts or events. *See, e.g., Bolanos-Hernandez v. INS, supra*, at 1321 and n.11; *Youkhanna v. INS, supra*, at 362; *Carvajal-Munoz, supra*, at 574, 576, 577; *Rejaie v. INS, supra*, at 145-46. In addition, each of the courts has assessed an alien's facts to determine whether he is likely to become a victim of persecution and, in so doing, has looked for facts demonstrating some combination of the four factors we have used to describe a likelihood of persecution. *See, e.g., Bolanos-Hernandez v. INS, supra*, at 1324; *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984); *Carvajal-Munoz v. INS, supra*, at 577-79; *Chavez v. INS*, 723 F.2d 1431, 1433-34 (9th Cir. 1984); *Shasee v. INS*, 704 F.2d 1079, 1083-84 (9th Cir. 1983).

Our construction of "a well-founded fear of persecution" is also consistent with some aspects of the UNHCR's interpretation of the Protocol. Like us, the UNHCR is of the opinion that the term "well-founded" requires a person's fear of persecution to be more than a matter of personal conjecture and to be supported by an objective situation. *Handbook, supra*, at 11-13, paragraphs 38, 41. Furthermore, the UNHCR is of the opinion that a person claiming a well-founded fear of persecution must show that he is not tolerated by, and has come to the attention of, a persecutor. *Handbook, supra*, at 19, paragraph 80. However, we are not certain that the UNHCR's position adequately reflects the concept, inherent both in the Protocol and in the construction of the well-

founded-fear standard at the time Congress employed it in section 101(a)(42)(A) of the Act, that refuge in this country should be dependent upon a showing of a likelihood of persecution. For example, the UNHCR advocates that a well-founded fear of persecution is established merely if an alien finds his return to a country to be "intolerable" or wishes to avoid situations entailing some risk of persecution. *Handbook, supra*, at 12-13, paragraphs 42, 45. Therefore, to the extent that the UNHCR's position in the *Handbook* does not require an individual to show he is likely to become a victim of persecution, we find that position to be inconsistent with Congress' intention and with the meaning of the Protocol.

Given our construction of the showing required by the language "a well-founded fear of persecution," it remains to be determined how this showing compares with the "clear probability" of persecution required for section 243(h) withholding of deportation. The Third and Seventh Circuits view the well-founded-fear and clear-probability standards to be either identical or very similar to one another. *Sotto v. INS, supra*, at 836; *Carvajal-Munoz, supra*, at 574-75. The Ninth Circuit, on the other hand, has concluded that the well-founded-fear standard is more generous to an alien than the clear-probability standard. *Bolanos-Hernandez v. INS, supra*, at 1321; *see also Stevic v. Sava, supra*, at 406.

One might conclude that "a well-founded fear of persecution, which requires a showing that persecution is likely to occur, refers to a standard that is different from "a clear probability of persecution," which requires a showing that persecution is "more likely than not" to occur. As a practical matter,



however, the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur. As we construe them, both the well-founded-fear standard for asylum and the clear-probability standard for withholding of deportation require an alien's facts to show that the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, that a persecutor is aware or could easily become aware the alien possesses this characteristic, that a persecutor has the capability of punishing the alien, and that a persecutor has the inclination to punish the alien. Accordingly, we conclude that the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge.

Our position is most consistent with what we perceive to have been Congress' understanding of the relationship between asylum and withholding of deportation at the time the present provisions were enacted in the Refugee Act of 1980. Prior to 1980, asylum and withholding of deportation were closely related forms of relief, and asylum was available if an alien could show the same likelihood of persecution

that was required for withholding of deportation.<sup>12</sup> The legislative history of the Refugee Act does not contain any express indication that Congress intended to alter this relationship; quite the contrary, the legislative history indicates that Congress understood it was preserving this relationship.<sup>13</sup>

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<sup>12</sup> Prior to the Refugee Act of 1980, a request for asylum filed after completion of deportation proceedings was considered to be a request for section 243(h) withholding of deportation and for, *inter alia*, the benefits of Article 33 of the Protocol and the U.N. Convention which prohibit the expulsion of a refugee to a place where his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." *INS v. Stevic*, *supra*, at 2494, 2496 n.13; *see also* 8 C.F.R. § 108.3(a) (1980). An applicant for asylum had the burden of proving that he "would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." 8 C.F.R. § 108.3(c) (1980).

Similarly, withholding of deportation under section 243(h) of the Act was construed to be comparable to the benefit afforded by Article 33 of the Protocol and the U.N. Convention. *See Matter of Dunar*, *supra*, at 319-20. An alien seeking withholding of deportation, like an alien seeking asylum, was required to show he "would be subject to persecution on account of race, religion, or political opinion. *See INS v. Stevic*, *supra*, at 2493 and nn.6, 7; 2496 n.13; 8 C.F.R. § 242.17(c) (1980).

<sup>13</sup> The Senate bill required that in order to be eligible for asylum an alien must meet the well-founded-fear definition of a refugee *and* must show that his deportation or return was prohibited by the section 243(h) withholding of deportation provision. S.643, *supra* note 10, § 203(e); S. Rep. No. 96-256, *supra*, at 16. The Senate assumed that this did not change the then-existing substantive standard for asylum. S. Rep. No. 96-256, *supra*, at 9. The House bill contained an asylum provision that made no express reference to withholding of deportation. *See H.R. 2816*, *supra* note 10, § 203(e). However, the House Judiciary Committee perceived asylum

Thus, under the changes made by the Refugee Act of 1980, an alien is eligible for asylum if he meets all of the other elements in the definition of a refugee under section 101(a)(42)(A) of the Act and can show "a well-founded fear of persecution," *i.e.*, objective facts that demonstrate it is likely he will become a victim of persecution. Section 208(a) of the Act. A grant of asylum provides him not only with temporary refuge in this country, but with the possibility of obtaining permanent refuge here, *i.e.*, an opportunity to become a lawful permanent resident. Section 209(b) of the Act. However, asylum is ultimately a matter of discretion. Section 208(a) of the Act. An alien may be denied asylum as a matter of discretion, may be found deportable or excludable, and then may find himself in the position of being expelled. In such a situation he is nonetheless protected against expulsion to the country of persecution, so long as he qualifies for withholding of deportation. *See* section 243(h)(1) and (2) of the Act. However, withholding of deportation only protects the alien

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and withholding of deportation to be related forms of relief accomplishing the same end, namely that of conforming United States law to the obligation of Article 33 of the Protocol and the U.N. Convention. H.R. Rep. No. 96-608, *supra*, at 17-18. The conference committee adopted the House's version of the asylum provision, and thus in the language of the statute did not link asylum to withholding of deportation. *See* H.R. Rep. No. 96-781, *supra*, at 5. Nevertheless, in its report the committee perceived asylum and withholding of deportation to be interchangeable and did not distinguish them as separate forms of relief. *Id.* at 20. We think these facts show that Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibility for these forms of relief to be essentially comparable. *But see* *Carvajal-Munoz v. INS*, *supra*, at 574-75 n.15.

from being expelled to the country in which his life or freedom would be threatened, it does not prevent his expulsion to some other country. *Compare* subsections (a) and (h) of section 243 of the Act.

We note that the Seventh Circuit has viewed this statutory structure as lending support for the conclusion that the standards for withholding of deportation and asylum are somewhat different from one another, for the court has concluded that Congress reasonably could have intended an entitlement to withholding of deportation to be available upon a greater showing than that required for a discretionary grant of asylum. *Carvajal-Munoz*, *supra*, at 575. Conversely, however, the structure of the Act also lends support for the conclusion that Congress intended withholding of deportation to be available upon a lesser showing than that required for asylum, because the right to avoid deportation to one particular country, which is afforded by withholding of deportation, is a lesser benefit than the privileges of remaining in this country under a grant of refuge and of becoming a permanent resident, which are afforded by asylum. Since the structure of the Act reasonably supports two contrary conclusions about the relationship between the standards for asylum and withholding of deportation, we do not find the Act's structure to be particularly helpful in ascertaining Congress' understanding or intention. Rather, we find a better indication of Congress' intention in the legislative history showing that Congress perceived the standards for asylum and withholding of deportation to be comparable to one another.

In the case before us, the respondent claims he fears persecution at the hands of two groups: the government and the guerrillas. Therefore, under our



construction of the well-founded-fear standard, the respondent must show that his fear of persecution by these groups is more than a matter of personal conjecture or speculation; he must show by objective events that his fear has a sound basis in fact and that persecution by the government or by the guerrillas is likely to occur if he is returned to El Salvador. This means that he must demonstrate that: (1) he possesses characteristics the government or the guerrillas seek to overcome by means of punishment of some sort; (2) the government or the guerrillas are aware or could easily become aware that he possesses these characteristics; (3) the government or the guerrillas have the capability of punishing him; and (4) the government and the guerrillas have the inclination to punish him.

The respondent's fear of persecution by the government has no basis whatsoever in either his personal experiences or in other external events. To the contrary, by the respondent's own admission this fear is based solely on his impression that some officials in the government may have viewed COTAXI as being too socialistic. This purely subjective impression is not sufficient to show a well-founded fear of persecution by the government.

In addition, whatever the facts may have been prior to the respondent's departure from El Salvador, those facts have changed significantly since 1981. Most importantly, the respondent admitted that he does not intend to work as a taxi driver upon his return to El Salvador. The respondent's facts do not show that the persecution of taxi drivers continued even after they stopped working as drivers. Furthermore, the respondent testified that the guerrillas' strength has diminished significantly in El Salvador

since 1981. For these reasons, the respondent has not shown that at the present time he possesses characteristics the guerrillas seek to overcome or that the guerrillas have the inclination to punish him. Thus, the facts do not demonstrate that there is a likelihood the respondent would be persecuted by the guerrillas should he be returned to El Salvador, and accordingly his fear of persecution upon deportation has not been shown to be well-founded.

(3) *The persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion."*

The respondent has argued that the persecution he fears at the hands of the guerrillas is on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador and is also on account of his political opinion.

The requirement of persecution on account of "membership in a particular social group" comes directly from the Protocol and the U.N. Convention. See page [40a], *supra*. Congress did not indicate what it understood this ground of persecution to mean nor is its meaning clear in the Protocol. This ground was not included in the definition of a refugee proposed by the committee that drafted the U.N. Convention; rather it was added as an afterthought. 1 A. Grahl-Madsen, *supra*, at 219. International jurisprudence interpreting this ground of persecution is sparse. G. Goodwin-Gill, *The Refugee in International Law* 30 (1983). It has been suggested that the notion of a "social group" was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a pos-

sible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee. 1 A. Grahl-Madsen, *supra*, at 219. A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity. G. Goodwin-Gill, *supra*, at 31. The UNHCR has suggested that a "particular social group" connotes persons of similar background, habits, or social status and that a claim to fear persecution on this ground may frequently overlap with persecution on other grounds such as race, religion, or nationality. *Handbook, supra*, at 19.

We find the well-established doctrine of *ejusdem generis*, meaning literally, "of the same kind," to be most helpful in construing the phrase "membership in a particular social group." That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with specific words. See, e.g., *Cleveland v. United States*, 329 U.S. 14 (1946), 2A Sands, Sutherland on Statutory Construction, *supra*, § 47.17. The other grounds of persecution in the Act and the Protocol listed in association with "membership in a particular social group" are persecution on account of "race," "religion," "nationality," and "political opinion." Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. See 1 A. Grahl-Madsen, *supra*, at 217; Goodwin-Gill,

*supra*, at 31. Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Applying the doctrine of *ejusdem generis*, we interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

In the respondent's case, the facts demonstrate that the guerrillas sought to harm the members of



COTAXI, along with members of other taxi cooperatives in the city of San Salvador, because they refused to participate in work-stoppages in that city. The characteristics refining the group of which the respondent was a member and subjecting that group to punishment were: being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work-stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice. See 1 A. Grahl-Madsen, *supra*, at 214. Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was "persecution on account of membership in a particular social group" within our construction of the Act.

Moreover, the respondent did not demonstrate that the persecution he fears is "on account of political opinion." The fact that the respondent was threatened by the guerrillas as part of a campaign to destabilize the government demonstrates that the guerrillas' actions were undertaken to further their political goals in the civil controversy in El Salvador. However, conduct undertaken to further the goals of one faction in a political controversy does not necessarily constitute persecution "on account of political opin-

ion" so as to qualify an alien as a "refugee" within the meaning of the Act.

As we have previously discussed, the term "persecution" means the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome. It follows, therefore, that the requirement of "persecution on account of political opinion" means that the particular belief or characteristic a persecutor seeks to overcome in an individual must be his political opinion. Thus, the requirement of "persecution on account of political opinion" refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution. See 1 A. Grahl-Madsen, *supra*, at 212, 220; G. Goodwin-Gill, *supra*, at 31. This construction is consistent with the other grounds of persecution enumerated in the Act such as "race", "religion", "nationality," and "membership in a particular social group," each of which specifies a characteristic an individual possesses that causes him to be subject to persecution. Moreover, this construction is consistent with Congress' intention that not all harm with political implications, such as that which arises out of civil strife in a country, qualifies an alien as a "refugee." See discussion page[s 46a-47a] and note 10 *supra*.

In the respondent's case there are no facts showing that the guerrillas were aware of or sought to punish the respondent for his political opinion; nor was there any showing that the respondent's refusal to participate in the work-stoppages was motivated by his political opinion. Absent such a showing, the respondent failed to demonstrate that the particular belief the guerrillas sought to overcome in him was his

political opinion. Therefore he does not come within this ground of persecution.

(4) *The alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.*

Traditionally, a refugee has been an individual in whose case the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relation of an oppressor to a victim. See 1 A. Grahl-Madsen, *supra*, at 97, 100. Thus, inherent in refugee status is the concept that an individual requires international protection because his country of origin or of habitual residence is no longer safe for him. *Id.* We consider this concept to be expressed, in part, by the requirement in the Act and the Protocol that a refugee must be unable or unwilling to return to a particular "country." See section 101(a)(42)(A) of the Act. We construe this requirement to mean that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country; he must show that the threat of persecution exists for him country-wide.

In the respondent's case, the facts show that taxi drivers in the city of San Salvador were threatened with persecution by the leftist guerrillas. However, the facts do not show that this threat existed in other cities in El Salvador. It may be the respondent could have avoided persecution by moving to another city in that country.<sup>15</sup> In any event, the respondent's facts

<sup>15</sup> It is unfortunate when persons may be obliged to give up their jobs and leave their homes as a result of fear. But that

did not demonstrate that the guerrillas' persecution of taxi drivers occurred throughout the country of El Salvador. Accordingly, the respondent did not meet this element of the standard for asylum.

In summary, the respondent's facts fail to show: (1) that his present fear of persecution by the government and the guerrillas is "well-founded;" (2) that the persecution he fears is on account of one of the five grounds specified in the Act; and (3) that he is unable to return to the country of El Salvador, as opposed to a particular place in that country, because of persecution. Thus, he has not met three of the four elements in the statutory definition of a refugee created by section 101(a)(42)(A) of the Act. Accordingly, the respondent has not shown he is eligible for a grant of asylum.

#### THE STATUTORY STANDARD FOR WITHHOLDING OF DEPORTATION

Section 243(h) of the Act, which specifies the standard of eligibility for withholding of deportation, requires an alien to show a clear probability of persecution, *i.e.*, that it is more likely than not he will be the victim of persecution, in a particular country. *INS v. Stevic, supra*, at 2498. As we indicated, *supra*, the showing of the likelihood of persecution contemplated by this standard converges, in practice, with the showing required by the well-founded-fear standard for asylum. Therefore, since the respondent has not demonstrated a sufficient likelihood of persecution at the hands of either the government or the guerrillas to make his fear "well-founded," it follows

is not the issue here. The issue is, once that decision is made, does an individual have the right to come to the United States rather than to move elsewhere in his home country.



that the respondent has not demonstrated the "clear-probability" of persecution needed for withholding of deportation. Moreover, since the conduct the respondent fears has not been shown to be inflicted on account of "membership in a particular social group" or "political opinion" within our construction of the Act, the respondent has also failed to show that he comes within one of the five grounds of persecution specified in section 243(h). Accordingly, the respondent has not met the standard of eligibility for withholding of deportation.

For the foregoing reasons the respondent has not shown he is eligible for asylum or withholding of deportation to El Salvador. Therefore, we shall dismiss his appeal.

ORDER: The appeal is dismissed.

Chairman

MJP:cls

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No. 85-782

Supreme Court, U.S.

FILED

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In The  
**Supreme Court of the United States**  
October Term, 1985

Immigration and Naturalization Service,  
*Petitioner,*

v.

Luz Marina Cardoza-Fonseca,  
*Respondent.*

**BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI**

**BRIEF OF RESPONDENT**

DANA MARKS KEENER  
*Attorney for Respondent*

517 Washington Street  
San Francisco, CA 94111  
(415) 421-0860

SUSAN M. LYDON, OF COUNSEL  
Member, Bar of the  
Supreme Court of California  
Stanford Immigration Clinic  
1395 Bay Road  
East Palo Alto, CA 94303  
(415) 853-1600

14P



**QUESTION PRESENTED**

Is there a difference between the "well-founded fear of persecution" standard applicable under Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), and the "clear probability" standard applicable under Section 243(h) of the Act, 8 U.S.C. § 1253(h)?

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No. 85-782

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In The  
**Supreme Court of the United States**  
October Term, 1985

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Immigration and Naturalization Service,  
*Petitioner,*

v.

Luz Marina Cardoza-Fonseca,  
*Respondent.*

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**BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI**

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**BRIEF OF RESPONDENT**

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**STATEMENT**

The Respondent is a native and citizen of Nicaragua who last entered the United States as a visitor on June 25, 1979. She remained longer than her authorized stay, and thus deportation proceedings were instituted.

At a hearing before an immigration judge on December 14, 1981, Respondent conceded deportability, applied



for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1158(a), and applied for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h).

Respondent testified that she holds a political opinion which is opposed to the Sandinista regime, although she was not politically active while living in Nicaragua. (Administrative Record, hereafter "AR", at 72 and 73) She believes that her opinion is likely to be brought to the attention of the authorities in Nicaragua because of her very close relationship with her brother. (AR 58, 59) During the Somoza regime, he was arrested and tortured because he was betrayed by his former Sandinista comrades. (AR at 34, 37, 40, 42) After this denunciation, Respondent's brother renounced his affiliation to the Sandinista movement, and publically criticized its progression towards communism. (AR at 38, 39, 40, 42) He subsequently came to the United States and applied for asylum. (AR 31)

Respondent fears that the Sandinista regime will now persecute her to retaliate against her brother, or in an attempt to extract information from her which the Sandinistas believe he has told her. (AR 50, 51, 55, 58, 59) Respondent's sister in Nicaragua advised her it was too dangerous for Respondent to return, and that the Sandinistas were still vigorously searching for their brother. (AR 58, 59)

The immigration judge found Respondent had failed to show a clear probability that she would be persecuted in Nicaragua. (Pet. App. 27a) Finding this to be the

standard for both asylum and withholding of deportation, he denied both requests. (Pet. App. 27a) The judge did find that Respondent merited the favorable exercise of discretion, and granted her the privilege of voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254 (e). (Pet. App. 27a)

The Board of Immigration Appeals (hereafter, "the Board") dismissed Respondent's appeal, agreeing with the immigration judge that she failed to establish a clear probability that she would suffer persecution within the meaning of either the asylum or withholding provisions of the Act. (Pet. App. 21a) The Board ignored Respondent's argument that the clear probability standard was the wrong standard to apply to the asylum request, and claimed that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood'" of persecution. (Pet. App. 21a)

The Court of Appeals reversed the Board's denial of asylum and remanded for further proceedings. (Pet. App. 1a-16a) It held that the well-founded fear standard, which an asylum applicant must satisfy, is meaningfully different from the clear probability standard applicable to withholding of deportation. (Pet. App. 4a-9a) The Court of Appeals rejected the proposition of the Board that "as a practical matter" the two standards actually "converge." (Pet. App. 11a) The Court held that where an applicant demonstrates a subjective fear of persecution which has an objective basis, the fear is considered well-founded. Unlike the requirement of the clear probability test, "the likelihood of persecution need not be greater than fifty percent." (Pet. App. 9a)

Therefore, the Court of Appeals found that the Board of Immigration Appeals erred by applying the clear probability standard of proof to Respondent's asylum application, and remanded the asylum claim for consideration under the proper legal standard. (Pet. App. 14a)

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**SUMMARY OF ARGUMENT  
REASONS FOR DENYING CERTIORARI**

The Court below defined the meaning of the "well-founded fear" standard applicable to requests for asylum under section 208(a), a definition previously left open by this Court in *INS v. Stevic*, 104 S.Ct. 2489 (1984). However, because that standard had never been applied to the underlying facts of the case, a remand was ordered.

The decision of the Ninth Circuit is correct, supported by the statute's plain language and the legislative history. It is also in accord with the decisions of several other Circuit Courts.

Although one Circuit Court disagrees with the Ninth Circuit and the other Circuits regarding the meaning of the legal standard, this case is not a proper one for this Court to consider. It is not ripe for review, and it does not present the issue in a fully developed context where the governing agency has actually applied the legal standard in question.

Rather than creating the administrative burden feared by Petitioner, declining to review this decision would be prudent, because the case does not now provide a good basis for review by this Court.

**ARGUMENT**

**I.**

**THIS CASE IS NOT YET RIPE FOR REVIEW  
NOR IS IT A PROPER VEHICLE TO RAISE  
THE QUESTION PRESENTED**

Although the Petitioner correctly recognizes that a conflict exists amongst the circuit courts on the issue of the standard applicable to asylum claims, this is not a proper case to review that issue prior to the Board's decision on remand.

The Court below ordered a remand to the Board so it could apply the proper legal standard to the facts presented. Since neither the immigration judge nor the Board applied this standard previously, the facts of this case have never been assessed under it.

The propriety of deferring review by this Court until after remand has been recognized by this Court. In *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Bangor & Aroostoor Railroad Co., et al.*, 389 U.S. 327, 328 (1967), this Court determined that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

By its very nature, any request for asylum is inextricably bound to its individual facts. Therefore, perhaps unlike some other legal standards, the abstract articulation of the well-founded fear standard does not fully describe its import nor provide clear guidance for its practical use. No matter how well defined the standard may be in the abstract, the crux of its meaning can only be given life by its application to specific facts in a case by case analysis.

The need for review subsequent to a remand is especially compelling in this type of case, where the application of the proper legal standard to an intricate factual situation is central. Prior to a remand, the actual application of the standard would not be before this Court, and an important aspect of the standard would thereby escape review. Review by this Court now would be devoid of realism.

In this case, the well-founded fear standard has *never* been applied to the underlying facts. This Court should not deprive the Board of an opportunity to apply the standard. Any review prior to the actual application of the legal standard to the facts would result in an abstract, theoretical, and speculative exercise.

The Court of Appeals ordered a remand here to enable the Board to perform its duty of applying the proper legal standard to the facts. Thus, for the same reasons acknowledged by this Court in *Brotherhood of Locomotive Firemen and Enginemen, supra*, this case is not ripe for review.

When the Board does apply both the well-founded fear standard and the clear probability standard in a particular case, the resulting decision provides a far more thorough factual analysis than when it does not. In a lengthy opinion, the Board has already applied the standard as described by the Ninth Circuit. *Matter of Sanchez and Escobar*, — I&N Dec. —, I.D. #2996, (BIA October 15, 1985), *see also Matter of Gharadaghi*, — I&N Dec. —, I.D. #3001, (BIA November 1, 1985). *See also Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985) (holding the applicant qualified for asylum but not withholding of de-

portation.) The painstaking detail with which the evidence was reviewed in these cases underscores the fact-bound nature of determinations in refugee cases. Such an analysis has never occurred here, thereby preventing review of the standard in any meaningful way. Therefore, this case is not the best vehicle for review of this intricate subject.

This Court can choose to defer its review of this case until after a decision on remand without prejudicing a later grant of certiorari, even in this very case. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Company*, 240 U.S. 251, 257-8 (1916). Thus, review on a full record at a later date is not foreclosed.

Very simply, this case is not an appropriate one for review by this Court since it is not ripe. Because review of a legal standard prior to its application to the relevant facts is premature and unnecessarily abstract, the petition for certiorari should be denied.

## II.

### THE COURT BELOW CORRECTLY INTERPRETED THE LANGUAGE AND SCHEME OF THE REFUGEE ACT

Even a very brief discussion of the merits will demonstrate that the Court below was correct in its decision.

- a. The existence of different standards of proof for asylum and withholding of deportation relief is in harmony with the statutory scheme of benefits and protections for refugees set out in the Immigration and Nationality Act.

The Petitioner argues that it is anomalous that the standard of proof for asylum is lesser than that required



to prove eligibility for withholding of deportation because asylum is the "broader relief." (Petition for Writ of Cert. at 9 and n.6) Petitioner's contention overlooks the fact that the difference in standards comports with both the logic and structure of the Act, important considerations discussed by the court below. (Pet. App. 6a-7a)

Withholding of deportation under section 243(h) is a mandatory form of relief for aliens who establish eligibility. See *INS v. Stevic*, 104 S.Ct. at 2497; *Bolanos-Hernandez v. INS*, 767 F.2d 1316, 1320 (9th Cir. 1985). But an alien who qualifies for asylum by meeting the definition of refugee in 8 U.S.C. § 1101(a)(42)(A), may nevertheless be denied relief in the exercise of discretion by the District Director, Immigration Judge, or Board of Immigration Appeals. See 8 U.S.C. § 1158(a). See also *Bolanos*, 767 F.2d at 1320.

It is not anomalous for the standard of proof to be higher where the applicant is making a claim of *entitlement* to relief, rather than a discretionary request. See *Caravajal-Munoz v. INS*, 743 F.2d 562, 575 (7th Cir. 1984). There is a sensible rationale for this result when viewed in the context of the actual situations in which the standards are applied.

Requiring a heavier burden for the mandatory relief is easy to understand when placed in the procedural setting where these cases arise. Take for example, an alien with a well-founded fear of persecution who applies for both forms of relief, but who must overcome an extremely adverse immigration history. To even reach the issue of withholding of deportation, the adjudicator would have already decided not to exercise discretion favorably. Such

a decision plainly demonstrates a determination that no relief is warranted besides that protection afforded by a humanitarian nation which finds it unconscionable to deport someone to a land where he would surely be persecuted. Having already decided not to grant any relief other than that which is absolutely necessary, it is logical that withholding of deportation is mandated only when the evidence presented meets the higher standard of clear probability.

Contrary to Petitioner's assertion, a lesser standard for asylum is both logical and consistent with the letter and spirit of the law.

**b. The clear language of the statute provides different standards of proof for asylum applications and withholding of deportation requests.**

The court below correctly noted that "[t]he plain terms of section 208(a) require applicants for asylum to demonstrate a "well-founded fear of persecution." *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) (Pet. App. 5a)

This Court has never attempted to define the well-founded fear standard applicable to asylum claims. *Stevic* held that the correct standard of proof for withholding of deportation under section 243(h) was proof of a "clear probability" of persecution, although the Act itself provides no explicit standard. However, the Court assumed the well-founded fear standard is more generous. See *Stevic*, 104 S.Ct. at 2498, 2500-2501.

In deciding *Stevic*, the Court pointed out that section 243(h) does not refer to section 101(a)(42)(A), nor does it use the term "well-founded fear," or refer to refugees or asylees. See *Stevic* at 2498. Conversely, there is no

textual basis in the statute for concluding that the “clear probability” standard is relevant to an application for asylum under section 208(a).

Thus, by the very terms of the statute, Congress chose not to codify the clear probability standard into the newly added asylum provisions of section 208(a). The words Congress used to describe the standard of proof for asylum, “well-founded fear of persecution,” indicate Congress intended a distinct standard. The words themselves are unambiguous in calling for both a subjective and objective component to the standard—“fear” being subjective, and “well-founded” implying some objective basis in reality. *See Stevic*, 104 S.Ct. at 2498 (discussion of several interpretations of the term “well-founded fear”). Such was the holding of the court below.

This extrapolation of meaning from the plain language of the statute is a proper judicial determination and is supported by the legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. (March 17, 1980). *See discussion infra*. The interpretation of the court below was clearly correct.

**c. The Congressional intent demonstrates that the standard of proof for asylum claims is different from the standard applied to claims for withholding of deportation.**

The provisions of section 208(a) of the Refugee Act provide the Attorney General with discretionary authority to grant asylum to any alien who qualifies as a refugee under section 101(a)(42)(A) of the Act. A refugee is defined in the Act as a person outside his native country who cannot return because of a “well-founded fear of

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A).

Unlike section 243(h) which had predecessor provisions in U.S. immigration law for over thirty years, the enactment of section 208(a) established for the first time a statutory system for immigrant refugees within the United States to seek permission to remain on account of their well-founded fear of persecution. The amendment of section 243(h) by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 197, was to conform our statutory law to international agreements. In accordance with this purpose, section 243(h) was amended to provide a mandatory rather than discretionary prohibition on refoulement, as required by Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150. *See Stevic*, 104 S.Ct. at 2496 n. 15. The new asylum provision, however, codifies a statutory scheme that looks to Article 1 of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which is a separate and distinct provision.

The “well-founded fear of persecution” language was borrowed from the definition of “refugee” used in both the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, and the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577. Therefore, this language brought with it a long history of interpretation by the United Nations High Commissioner on Refugees (hereafter, “the U.N.H.C.R.”) when it was incorporated into the Refugee Act of 1980. As this Court observed in *Stevic*, the refugee provision which contains the well-founded fear stand-



ard "[was] intended . . . to be construed consistently with the Protocol . . . ." 104 S.Ct. at 2499 (citations omitted). *See also Caravajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984).

Because Congress intended that the asylum provision be construed consistent with the Protocol, the courts have properly looked to materials interpreting the "well-founded fear" standard of the Protocol for guidance on the definition of that phrase as used in the Immigration and Nationality Act. *See Caravajal-Munoz*, 743 F.2d at 573-574. These interpretations plainly evidence a more generous burden of proof on the applicant for refugee status than that expressed by the "clear probability" standard of section 243(h). *See the U.N.H.C.R. Handbook on Procedures and Criteria for Determining Refugee Status* (1979), paragraphs 37, 38, and 39; the United Nations Report of the Ad-Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618 and Corr. 1 (Feb. 17, 1950) at 39 ("well-founded fear . . . means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.")

The interpretation of this standard set forth in the decision of the court below is consistent with the Congressional intent and United Nations Protocol. The position of the Petitioner here is not. *See* Amicus Brief of the Office of the United States High Commissioner for Refugees in *Stevic* at 25-28.

**d. The Board's interpretation of the statutory term "well-founded" fear is inconsistent with the mandate of the Refugee Act, and is therefore not entitled to deference.**

The Court below did not err by deciding not to defer to the Board's interpretation that the well-founded fear

standard for asylum is equivalent to the clear probability standard applicable to withholding of deportation.

The courts are the final authority on issues of statutory construction. *FTC v. Colgate Palmolive Co.*, 380 U.S. 372, 385 (1965). Even where an administrative agency is involved, the Administrative Procedure Act, 5 U.S.C. 551, et seq., requires the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

Deciding the meaning of a statute based on an agency's interpretation of a specific congressional intent is a "quintessential judicial function" and the agency's interpretation is not binding on the courts. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 98 n.8 (1983).

Because the Board's construction here is inconsistent with the statutory mandate and frustrates the congressional policy on refugees, the court need not defer to the Board's opinion. "[Reviewing courts] must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'." *Bureau of Alcohol, etc.*, 464 U.S. at 97, quoting *N.L.R.B. v. Brown*, 380 U.S. 278, 291-292 (1965). *See also Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 117-118 (1978).

And where, as here, the agency's changing interpretations indicate an ambiguity in the language of the statute and its legislative history, it is proper for the court to decide the issue. *Process Gas Consumers Group v. U.S. Dept. of Agriculture*, 694 F.2d 778, 792, 224 App. D.C. 212



(D.C. 1982) (*en banc cert denied, La. v. Fed. Energy Reg. Commsn.*, 461 U.S. 905 (1983).)

The Board's interpretation of this language has been far from consistent. Although the Board announced in *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973) that it believed that the clear probability of persecution standard it then applied was not different from the well-founded fear of persecution standard found in the 1967 Protocol Relating to the Status of Refugees, in practice, the Board's application of these standards of proof has varied considerably. Compare *Matter of McMullen*, 17 I&N Dec. 542, *rev'd on other grounds, McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981) (requiring proof of actual persecution), with *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982) (requiring "objective evidence that [the applicant] has a well-founded fear that he is likely to be singled out for persecution . . ."), and *Matter of Sibrun*, 18 I&N Dec. 354, 358 (BIA 1983) (requiring that the alien "demonstrate a likelihood that he individually will be singled out and subjected to persecution.") The resulting pattern of inconsistent decisions demonstrates the absence of an informed Service position to which the courts might defer.

The fact that Petitioner claims that the well-founded fear standard and the clear probability standard are not materially different does not make it so. When the Board equates the two standards, it misconstrues the term "well-founded fear" and violates the clear intent of Congress.

**e. The weight of authority supports the construction of this provision determined by the court below.**

Following this Court's opinion in *Stevic*, four Circuit Courts of Appeal have defined the standard of proof to be

used for asylum claims made under 8 U.S.C. § 1158(a)(42) (A). Of the four circuits, three have agreed that the well-founded fear standard is more generous to the alien than the clear probability standard applied to requests for withholding of deportation. See *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) (Pet. App. 1a-16a); *Bolanos-Hernandez v. INS*, 767 F.2d 1316 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985); *Caravajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984); *Dolores v. INS*, 772 F.2d 223 (6th Cir. 1985); *Youkhanna v. INS*, 749 F.2d 360 (6th Cir. 1984). Cf. *Reyes v. INS*, 747 F.2d 1045 (6th Cir. 1984), *cert. den.* No. 84-6145 (April 22, 1985); *Dally v. INS*, 744 F.2d 1191 (6th Cir. 1984).

These courts, reviewing the very same considerations examined here, found that the plain meaning, congressional intent and humanitarian purpose of the Refugee Act of 1980 supported the conclusion arrived at by the court below. The decision below is correct.

### III.

#### **DECLINING TO REVIEW THIS DECISION WILL NOT IMPOSE THE SUBSTANTIAL BURDEN ALLEGED BY PETITIONER**

Petitioner's claim that thousands of denials of asylum applications will be subject to attack should the Ninth Circuit's decision in this case stand is greatly exaggerated and should not eclipse the proper concern of this Court that only an appropriate case on the question presented should be selected for review.

Those cases which are still in the process of review, either before the Circuit Courts or the Board, will now

simply be evaluated using the proper standards. In fact, the Board has already done this without any of the difficulties the Petitioner would lead one to anticipate. *See Matter of Escobar and Sanchez*, — I&N Dec. —, I.D. #2996 (BIA October 15, 1985), and *Matter of Gharadaghi*, — I&N Dec. —, I.D. #3001 (BIA November 1, 1985). The Ninth Circuit has also demonstrated this can easily be accomplished. *See Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985), where the Court found the applicant met the standard for asylum but did not qualify for withholding of deportation.

The Petitioner's argument that denial of review in this Court will create a rash of motions to reopen is specious. The vast majority of those applicants whose cases have been finally decided will have already left the country pursuant to grants of voluntary departure or deportation orders. Clearly, those applicants cannot now challenge previous determinations.

Moreover, administrative convenience surely does not outweigh the judicial considerations which determine whether review by this Court is warranted in a particular case. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1040 (5th Cir. 1982) (the administrative burden created by slowing the adjudication process in asylum cases does not tip the constitutional balance in favor of the government.) Administrative concerns are minor compared to the necessity of determining an issue in the context of a case which has been fully developed. Indeed, premature review can necessitate repetitive review of the same issue to clarify a holding in a later case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANA MARKS KEENER  
Attorney for Respondent

January 1986

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No. 85-782

Supreme Court, U.S.

FILED

JAN 21 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONER

CHARLES FRIED  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*



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## **REPLY MEMORANDUM FOR THE PETITIONER**

Respondent concedes (Br. in Opp. 5) that there is a conflict in the circuits on the question presented in this case, and she devotes the bulk of her brief in opposition (at 7-15) to arguments on the merits, which are adequately addressed in our petition (at 9-19). We respond here to respondent's suggestion (Br. in Opp. 5-7) that the Court should not grant review because the court of appeals remanded the case to the Board of Immigration Appeals for further proceedings. For a number of reasons, this argument is completely meritless.

In the first place, the question presented—whether 8 U.S.C. 1158(a) makes an alien eligible for asylum on a lesser showing of persecution than is necessary to obtain withholding of deportation under 8 U.S.C. 1253(h)—is purely one of law. The Court's consideration of the question therefore would not benefit from further factual development in

this case. As we discussed in the petition (at 15-18), the Board exhaustively considered the appropriate burden of proof for asylum applicants in *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 29a-68a). Further discussion of the issue by the Board is unnecessary.

Moreover, contrary to respondent's assertion (Br. in Opp. 7), this may well be the Court's only opportunity to review the court of appeals' decision in this case. If the Board on remand were to grant respondent relief, we would not be able to seek judicial review of that decision. We note as well that the Court granted review in *INS v. Stevic*, No. 82-973 (June 5, 1984), which was in the identical procedural posture as this case.

Finally, the conflict in the circuits requires expeditious resolution. Several thousand aliens file asylum applications each year (see Pet. 19 n.10). The Board, the Immigration and Naturalization Service, and these aliens have a strong interest in the Court's definitive clarification of the appropriate standard that should be applied in asylum proceedings. Without a decision by this Court, the Board would be forced to apply different standards in cases subject to review in different circuits, and it would not know what standard to apply in those circuits that have not yet addressed the issue.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED  
*Solicitor General*

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CHARLES FRIED

*Solicitor General*

RICHARD K. WILLARD

*Assistant Attorney General*

CAROLYN B. KUHL

*Deputy Solicitor General*

BRUCE N. KUHLIK

*Assistant to the Solicitor General*

LAURI STEVEN FILPPU

DAVID V. BERNAL

*Attorneys*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

4/18/85



### **QUESTION PRESENTED**

Whether an alien's burden of proving eligibility for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1253(h).

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 85-782

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 767 F.2d 1448. The opinions of the Board of Immigration Appeals (Pet. App. 17a-23a) and of the immigration judge (Pet. App. 24a-28a) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on August 12, 1985. The petition for a writ of certiorari was filed on November 5, 1985, and was granted on February 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTES INVOLVED**

Section 101(a)(42) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(42), provides in pertinent part:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside

any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion \* \* \*.

Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Section 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h)(1), provides in pertinent part:

The Attorney General shall not deport or return any alien \* \* \* to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

#### STATEMENT

1. Respondent is a 37-year old native and citizen of Nicaragua. She entered the United States on June 25, 1979, as a nonimmigrant visitor authorized to remain until September 30, 1979. After staying in this country beyond that date without permission, respondent was granted the privilege of voluntarily departing the United States by

September 28, 1980. Respondent failed to take advantage of this opportunity, and deportation proceedings were instituted against her in March 1981. Pet. App. 2a, 25a.

a. At a hearing in December 1981 before an immigration judge, respondent, who was represented by counsel, conceded deportability and requested asylum and withholding of deportation pursuant to Sections 208(a) and 243(h), respectively, of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), 1253(h). Pet. App. 25a. Respondent testified that, although "she was a non-political person" (*id.* at 27a), she felt that she would be persecuted in Nicaragua on the basis of the political activities of her brother, who testified that "the Sandinistas would persecute him" because he is "no longer involved with that party or sympathetic to its ends" (*id.* at 25a).

The immigration judge denied respondent's request for asylum and withholding of deportation (Pet. App. 24a-28a). He stated that the governing legal standard was whether respondent had shown "a clear probability of persecution" if she returned to Nicaragua (*id.* at 27a). The immigration judge concluded that there was no evidence "indicat[ing] that the respondent would be persecuted for [her] political beliefs, whatever they may be" (*ibid.*). The immigration judge noted that, whatever the merits of her brother's claim that he would be persecuted, respondent had not shown that any other members of her family faced a similar danger (*ibid.*).

b. The Board of Immigration Appeals dismissed respondent's appeal (Pet. App. 17a-23a). The Board "agree[d] with the immigration judge that the respondent ha[d] failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act" (*id.* at 21a). In response to her contention that "the immigration judge applied the wrong legal standard" to respondent's asylum claim by requiring her to show a " 'clear probability of persecution' "



rather than a " 'well-founded fear of persecution' " (*id.* at 18a-19a), the Board stated that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood' " of persecution (*id.* at 21a).

The Board determined that respondent "failed to support, through objective evidence, her generalized assertion that she will be subject to persecution based on her brother's political problems with the Sandinistas" (Pet. App. 21a). In support of this conclusion, the Board noted that respondent "admitted that she herself has taken no actions against the Nicaraguan government[,] \* \* \* has never been politically active[,] \* \* \* [has] never assisted her brother in any of his political activities[,] \* \* \* [and] has never been singled out for persecution by the present government" (*id.* at 22a). Finally, the Board characterized respondent's unsupported fears based on her relationship to her brother as "mere speculation" (*ibid.*).

2. The court of appeals reversed the Board's denial of asylum and remanded for further proceedings (Pet. App. 1a-16a).<sup>1</sup> The court held (*id.* at 4a-9a) that an alien's burden of proving a "well-founded fear" of persecution to establish eligibility for asylum is less demanding than the burden of proving a "clear probability" of persecution, which this Court held in *INS v. Stevic*, 467 U.S. 407 (1984), is the proper standard to establish eligibility for withholding of deportation. In reaching its conclusion, the court of appeals rejected (Pet. App. 5a, 11a) the position of the Board of Immigration Appeals (*id.* at 31a) "that as a practical matter" the two standards "converge[]." *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985)

<sup>1</sup> The court of appeals' decision also addressed the Board's denial of relief to another alien, Francisca Rosa Arguello-Salguera, whose case had been separately briefed and argued. We have not sought review of the judgment with respect to Arguello-Salguera.

(Pet. App. 29a-68a). In the court's view, the different formulations of the burdens of proof that it mandated for obtaining asylum and withholding of deportation entailed "a significant practical consequence" (Pet. App. 9a):

The term "clear probability" requires showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

So long as an alien subjectively fears persecution, he will be eligible for asylum under the court's test if he can point to specific facts "support[ing] an inference of past persecution or risk of future persecution" (Pet. App. 10a-11a).

The court concluded (Pet. App. 12a-13a) that the Board erred in this case by applying the same burden of proving a clear probability of persecution to respondent's asylum claim as to her claim for withholding of deportation, rather than determining separately whether respondent had a "well-founded fear" of persecution. It therefore remanded for consideration of respondent's asylum claim "under the proper legal standard" (*id.* at 14a). Respondent had not appealed the denial of her request for withholding of deportation (*id.* at 3a), and the court therefore did not disturb the Board's ruling that she is not entitled to that relief.

#### SUMMARY OF ARGUMENT

In *INS v. Stevic*, 467 U.S. 407 (1984), this Court held that an alien must demonstrate a clear probability or likelihood of persecution in order to establish eligibility

for withholding of deportation. The question presented here, which was left open in *Stevic*, is whether a different eligibility standard applies for asylum, which requires that an alien demonstrate a well-founded fear of persecution. The Board of Immigration Appeals, whose interpretation of the immigration statute is entitled to substantial deference, *INS v. Wang*, 450 U.S. 139 (1981), has concluded that Congress intended the same standard to apply to both forms of relief and that, in practice, a different standard could not in any event meaningfully be applied. There is no basis for disregarding the Board's conclusions.

Congress did not intend to make asylum an alternative to withholding of deportation as the legal bar to deportation of an alien in this country or at its borders who claims that he would be persecuted unless allowed to remain here. Rather, the legislative history of the Refugee Act of 1980 makes clear that Congress added the asylum provision simply to allow aliens to apply for refuge in this country outside of deportation or exclusion proceedings and to provide the opportunity for additional benefits, principally adjustment of status, for those aliens who have been granted withholding of deportation. There is no indication in the legislation history that, in the course of systematizing our immigration laws, Congress sought to establish a second, completely independent, avenue of relief for aliens already in deportation or exclusion proceedings.

The establishment of such an independent basis for avoiding deportation would, moreover, create significant anomalies. By permitting aliens to obtain asylum on a lesser showing of persecution than is necessary for withholding of deportation, the court of appeals' reading of the statute would effectively render superfluous the withholding of deportation section, which has been in the law for decades and was amended in 1980 expressly to implement our international obligations under Article 33 of

the United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. It would also permit aliens who do not face a sufficient likelihood of persecution to bar their deportation to obtain the substantially greater relief afforded by asylum. Nothing in the legislative history suggests that Congress intended such an anomalous result.

This is confirmed by Congress's understanding in 1980 of the "well-founded fear" standard. That language had consistently been interpreted to require precisely the same likelihood or clear probability of persecution that is necessary to make an alien eligible for withholding of deportation. See *In re Dunar*, 14 I. & N. Dec. 310 (1973); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977); *Stevic*, 467 U.S. at 419-420 & n.12. Congress was aware of this interpretation and plainly intended that it continue under the 1980 amendments. See *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

In addition to misapprehending the intent of Congress and the words of the statute, the court of appeals ignored the understanding of the Board of Immigration Appeals, achieved through years of adjudicating claims of persecution, that "fine distinctions" in the probability that an individual alien would be subject to persecution "can[not] be meaningfully made." *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 56a). Rather, the inquiry is a qualitative one into whether a persecutor has the capability and inclination to punish the alien on the basis of his race, religion, political opinion, or other characteristic specified in the statute. As applied in this context, "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." *Ibid*. Finally, the imposition of a different burden of proof for asylum than for withholding of deportation could unjustifiably require implementation of a costly and cumbersome dual adjudicatory scheme for deciding whether an alien is entitled to avoid deportation.



## ARGUMENT

### AN ALIEN'S BURDEN OF PROVING ELIGIBILITY FOR ASYLUM IS EQUIVALENT TO HIS BURDEN OF PROVING ELIGIBILITY FOR WITHHOLDING OF DEPORTATION

In *INS v. Stevic*, 467 U.S. 407 (1984), this Court held that an alien must demonstrate a clear probability or likelihood of persecution, defined as a showing that "it is more likely than not that the alien would be subject to persecution" (*id.* at 424), in order to establish eligibility for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. To be eligible for asylum under Section 208(a) of the Act, an alien must prove that he is a "refugee" as defined in Section 101(a)(42) of the Act, which requires that he establish a "well-founded fear of persecution." Although the parties and most of the amici in *Stevic* assumed that the standard for asylum is equivalent to that for withholding of deportation,<sup>2</sup> the Court left open the possibility that the standards might differ (467 U.S. at 425, 430).

The question in this case is the one left open in *Stevic*: whether an alien's burden of proving eligibility for asylum diverges in any meaningful fashion from his burden of proving eligibility for withholding of deportation. The answer to this question requires interpretation of the well-founded fear standard and an understanding of the relationship between asylum and withholding relief. The Board of Immigration Appeals, whose longstanding and consistent view of the statute is entitled to substantial deference, has concluded that the two eligibility standards are, in practical terms, identical and that this result

<sup>2</sup> Gov't Br. 20-21 & n.21; Resp. Br. 40; e.g., Amnesty Int'l USA Amicus Br. 54-58. But see American Immigration Lawyers Ass'n Amicus Br. 26-27 n.23.

best comports with Congress's intent when it added the asylum provision to the Act in 1980. There is nothing in the language or legislative history of the Act that would justify invalidating the Board's conclusion.

#### A. The Board of Immigration Appeals' Construction Of The Refugee Act Of 1980 Is Entitled To Substantial Deference

This Court has consistently admonished that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; see, e.g., *Chemical Manufacturers Ass'n v. NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844-845 (1984); *United States v. Clark*, 454 U.S. 555, 565 (1982). The phrase "well-founded fear of persecution," like the "extreme hardship" standard at issue in *INS v. Wang*, 450 U.S. 139 (1981), is "not self-explanatory, and reasonable men could easily differ as to [its] construction." *Id.* at 144; see *Stevic*, 467 U.S. at 424 (statute does not define well-founded fear of persecution). Congress, however, "committed [its] definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Wang*, 450 U.S. at 144; see also, e.g., *Connecticut Dep't of Income Maintenance v. Heckler*, No. 83-2136 (May 20, 1985), slip op. 7-8 (footnote omitted) ("an agency's construction need not be the only reasonable one in order to gain judicial approval").

From its earliest opportunity to consider the question in *In re Dunar*, 14 I. & N. Dec. 310 (1973), the Board of Im-



migration Appeals<sup>3</sup> has consistently interpreted the well-founded fear standard to require the same showing of a likelihood or clear probability of persecution that has always been required for withholding of deportation. Cognizant of the division among the courts of appeals that has developed since this Court left the question open in *Stevic* (see Pet. App. 32a),<sup>4</sup> the Board of Immigration Appeals undertook a comprehensive reexamination of its longstanding position that the standards are not meaningfully different in *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 29a-68a). In that decision, the Board carefully reviewed the administrative and judicial interpretations of the withholding and asylum standards, the legislative history of the Refugee Act of 1980, and the relationship between asylum and withholding relief. The Board also discussed the practical application of the burden of proof to individual cases and the administrative difficulties that would be created by applying two separate standards. In light of all of these considerations, the Board adhered to its view that the standards are equivalent and that an alien who is not entitled to obtain withholding of his deportation should not be able to gain the greater relief afforded by asylum.

As we demonstrate below, the Board correctly interpreted Congress's intent. Indeed, it is clear that in 1980 Congress ratified the Board's prior understanding of the meaning of the well-founded fear standard. See, e.g.,

<sup>3</sup> With certain exceptions not relevant here, the Attorney General is charged with the administration and enforcement of the Act. 8 U.S.C. 1103(a). He, in turn, has delegated to the Board appellate authority over decisions of special inquiry officers in deportation cases. 8 C.F.R. 3.1(b)(2), 242.17(c). The Board's decisions are final unless referred to the Attorney General. 8 C.F.R. 3.1(d)(2) and (h).

<sup>4</sup> Compare *Sankar v. INS*, 757 F.2d 532 (3d Cir. 1985) (standards are identical), with the decision below (standards differ) and *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984) (same). See also page 20 note 14, *infra*.

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). The Attorney General's involvement in the drafting of the 1980 amendments and the presentation of the Administration's views to Congress<sup>5</sup> further support the Board's position. See, e.g., *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984); *Miller v. Youakim*, 440 U.S. 125, 144 (1979). Moreover, the Board's unique expertise in applying the relevant legal provisions to the specific situations of individual aliens requires that special weight be given to its conclusion that the adoption of two separate standards would both make little sense and be administratively unworkable. Cf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-830 (1984); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). The consistency with which the Board has adhered to its position is also a significant factor supporting its interpretation. See, e.g., *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). For all these reasons, the Board's interpretation of the provisions of the Act governing asylum must be sustained.

**B. Congress Did Not Intend To Permit An Alien To Be Eligible For Asylum If He Is Not Eligible For Withholding Of Deportation**

Prior to 1980, the Immigration and Nationality Act allowed the Attorney General to withhold the deportation of an alien who faced a likelihood of persecution in the country of deportation. See 8 U.S.C. (1976 ed.) 1253(h).

<sup>5</sup> See, e.g., H.R. Rep. 96-608, 96th Cong., 1st Sess. 33-34 (1979); *The Refugee Act of 1979: Hearing on S. 643 Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 17 (1979) (testimony of Michael J. Egan, Associate Attorney General) (*Senate Hearing*); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on*

The Refugee Act of 1980 expressly made such withholding mandatory, in conformance with our international obligations. See *Stevic*, 467 U.S. at 421 & n.15. In 1980, Congress also added for the first time a statutory provision for asylum. This was intended to accomplish two purposes: first, to permit aliens in this country to apply for refuge without waiting for the commencement of deportation or exclusion proceedings, and second, to grant aliens who face persecution abroad the opportunity to become permanent residents and, ultimately, naturalized citizens of the United States.

There is no indication that Congress intended that asylum would be an alternative basis for avoiding deportation with a lower eligibility standard than withholding. Such a result ignores the limited purposes of the asylum provision. It would irrationally add a second avenue of relief where none was required and would in consequence make the withholding provision superfluous; and it would lead to the anomaly that aliens facing a lower probability of persecution than is required for withholding would obtain the greater relief available to asylees. This result is also fundamentally at odds with the legislative history of the 1980 Act, which demonstrates that Congress understood that the well-founded fear standard was, in fact, equivalent to the burden of proof required for withholding of deportation.

1. *Asylum was not intended to replace withholding of deportation as the legal bar to deportation of an alien facing persecution abroad*

As this Court noted in *Stevic* (467 U.S. at 425), "[t]he principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures

*International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71-72 (1979) (testimony of David Martin, Department of State).

governing the admission of refugees into the United States." Accordingly, "[t]he primary substantive change Congress intended to make under the Refugee Act \* \* \* was to eliminate the piecemeal approach to *admission* of refugees \* \* \* and to establish a systematic scheme for admission and resettlement of refugees." *Ibid.* (emphasis in original).<sup>6</sup> The Court held in *Stevic* that Congress did not alter the substantive standard that an alien already in the United States must meet in order to prevent his deportation pursuant to Section 243(h). *Id.* at 424-430. The Court also held that Section 243(h), as governed by this standard, which requires a showing that "it is more likely than not that the alien would be subject to persecution" (*id.* at 424), meets this country's international obligation not to return any refugee to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. See 467 U.S. at 428-430 n.22. In the course of regularizing our immigration procedures, Congress plainly did not intend to create an alternative avenue for avoiding deporta-

<sup>6</sup> Refugees had been admitted under three procedures. First, immigrants fleeing Communist-dominated or middle eastern countries because of persecution could be admitted as conditional entrants under former Section 203(a)(7) of the Act, 8 U.S.C. (1976 ed.) 1153(a)(7). Second, large groups of refugees were admitted pursuant to the Attorney General's parole authority under Section 212(d)(5) of the Act, 8 U.S.C. (1976 ed.) 1182(d)(5). Finally, since 1974, the Attorney General had provided by regulation that aliens could apply for asylum. 8 C.F.R. 108.1 (1976). See *Stevic*, 467 U.S. at 415-416, 420-421 n.13.

<sup>7</sup> While the United States is not a party to the Convention itself, this country acceded in 1968 to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, which requires (19 U.S.T. 6225) all parties to undertake to apply Articles 2 through 34 of the Convention.



tion, which would unnecessarily give aliens who could not obtain withholding of deportation a second bite at the apple.

a. When the bill that ultimately became the Refugee Act of 1980 was first considered by Congress, it did not contain any provision for asylum. The absence of such a provision left a gap in the procedures to which Congress intended to give statutory sanction: aliens abroad could apply for admission to the United States on grounds of persecution pursuant to Section 207 of the Act, 8 U.S.C. 1157; and aliens within the United States could seek withholding of deportation under Section 243(h), but only after deportation or exclusion proceedings had been commenced against them. However, the bill as originally written did not provide any mechanism for aliens within or at the borders of the United States to apply for refuge in this country without waiting for the commencement of deportation or exclusion proceedings. While such a procedure had been available pursuant to regulation since 1974 (see 8 C.F.R. 108.1 (1976)), a number of witnesses who testified at the congressional hearings recommended that express statutory authorization for the procedure be included in the bill.<sup>8</sup> This testimony also referred to the need for a

<sup>8</sup> See *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International); *id.* at 184 (testimony of Mr. Hannum); *id.* at 187-188, 190 (testimony of David Carliner, General Counsel, American Civil Liberties Union); *id.* at 250 (testimony of Wells C. Klein, Senior Vice Chairman, Committee on Migration and Refugee Affairs, American Council of Voluntary Agencies for Foreign Service); *id.* at 364 (statement of the American Jewish Committee); *id.* at 384 (additional statement of Mr. Klein); *Senate Hearing, supra*, at 52, 53 (testimony of Ingrid Walter, Chairman, Committee on Migration and Refugee Affairs, American Council of Voluntary Agencies for Foreign Service); *id.* at 157 (statement of the American Friends Service Committee).

uniform asylum procedure, which would allow aliens within this country an opportunity to obtain the same benefit of permanent residency as those aliens who would be admitted under Section 207 directly from overseas.<sup>9</sup>

Accordingly, the bill was amended to provide a "uniform procedure \* \* \* allow[ing] all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding." 125 Cong. Rec. 23233 (1979) (remarks of Sen. Kennedy). In addition, successful asylees were granted the opportunity to become lawful permanent residents of the United States in a manner similar to (though more restrictive than) that available to refugees admitted from abroad. Compare Section 209(a), 8 U.S.C. 1159(a) (refugees admitted from outside United States), with Section 209(b), 8 U.S.C. 1159(b) (asylees).

Singularly lacking from the legislative history, however, is any indication that Congress intended the asylum procedure to provide an independent, less demanding avenue of relief for aliens, such as respondent, who were already the subject of deportation or exclusion proceedings. To the contrary, it is clear that Congress intended that Section 243(h) would continue to provide the substantive relief of a bar to deportation to those aliens already in the United States, while asylum under Section 208 was viewed simply as codifying and regularizing a procedural mechanism for applying for refuge and for additional benefits beyond the withholding of deportation to the country of persecution required by Section 243(h). See S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. 96-608, 96th Cong., 1st Sess. 17-18 (1979).<sup>10</sup>

<sup>9</sup> See, e.g., *Senate Hearing, supra*, at 52, 53 (testimony of Mrs. Walter) (asylees should be permitted to adjust to permanent resident status).

<sup>10</sup> This is confirmed by a comparison of the Senate and House bills. The Senate bill, S. 643, 96th Cong., 1st Sess. (1979), expressly provided that an alien could not obtain asylum unless "his deportation or



b. Congress' intent that asylum would not replace withholding of deportation as the legal bar to deportation is confirmed by the various meanings attributed to "asylum" during its consideration of the Refugee Act. While "the term 'asylum' \* \* \* [was] used in various ways" (*Stevic*, 467 U.S. at 427), none of its contexts suggested that it was an independent avenue for barring the deportation of aliens already within the United States. As relevant to such aliens, asylum was used in two senses. First, it was regarded as synonymous with withholding of deportation. See, e.g., *The Refugee Act of 1979: Hearing on S. 643 Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 197 (1979) (study prepared by Congressional Research Service); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm.*, 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International). As such, of course, asylum could not possibly have been considered an independent alternative to withholding of deportation.

Second, asylum was used in reference to the Attorney General's regulations allowing aliens within this country to apply for refuge, which would be given an express statu-

return would be prohibited under section 243(h)." 125 Cong. Rec. 23253 (1979). The House bill, H.R. 2816, did not include this proviso. *Id.* at 37244. Had the Senate bill been enacted, of course, the court of appeals' position in this case would be rejected out of hand. But while the conferees ultimately adopted the House bill, they did not note any difference between the two asylum proposals (although they did describe differences between the House and Senate amendments to Section 243(h)), thus indicating that they assumed that there was no substantial difference between them. All that the conference report stated in this regard was that the bill directed the Attorney General "to establish a new uniform asylum procedure." S. Rep. 96-590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. 96-781, 96th Cong., 2d Sess. 20 (1980). Had the conferees believed that the House bill, unlike the Senate's, made asylum available to aliens who are not eligible for withholding of deportation, they surely would have commented on so important a difference.

tory basis by the asylum provisions added to the Act. See, e.g., H.R. Rep. 96-608, *supra*, at 17.<sup>11</sup> Under these regulations, asylum was considered the "functional equivalent" of withholding of deportation. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1029 (5th Cir. 1982). Moreover, as amended in 1979, the asylum regulations expressly provided that applicants would be subject to the same burden of showing that they "would be subject to persecution" that was imposed on applicants for withholding of deportation. See *Stevic*, 467 U.S. at 420-421 n.13; compare 8 C.F.R. 108.3(a) and 236.3(a)(2) (1980) (asylum) with 8 C.F.R. 242.17(c) (1980) (withholding of deportation). That language, as the Court held in *Stevic* (467 U.S. at 422, 424), requires a showing of a likelihood or clear probability of persecution.<sup>12</sup>

<sup>11</sup> 8 C.F.R. 108.1 (1976) provided that "an alien who is seeking admission to the United States at a land border port or preclearance station" could apply for asylum "to the nearest American consul." Asylum applications by aliens within the United States or at an airport or seaport were to be submitted to "the district director [of the Immigration and Naturalization Service] having jurisdiction over [the alien's] place of residence in the United States or over the port of entry." Under these regulations, the immigration judges and the Board of Immigration Appeals did not have jurisdiction over asylum claims. If asylum was denied by the consul or district director, the alien was permitted to seek withholding of deportation in subsequent deportation or exclusion proceedings. See *Stevic*, 467 U.S. at 420-421 n.13.

<sup>12</sup> The 1979 regulations conferred jurisdiction over asylum claims on the immigration judges and the Board for the first time. See *Stevic*, 467 U.S. at 420-421 n.13. Once deportation or exclusion proceedings had begun, the request for asylum was interpreted as a request for withholding of deportation. See 8 C.F.R. 108.3(a) (1980) ("A request for asylum introduced by an alien \* \* \* after commencement of deportation proceedings shall be considered as a request for withholding of deportation under section 243(h) of the Act and for the benefits of Articles 32 and 33 of the Convention [which prevent the expulsion of lawfully admitted refugees or the return of any refugee to a

Moreover, in promulgating the 1979 regulations, the Immigration and Naturalization Service expressly rejected suggestions, based on the well-founded fear language of the Convention, that the asylum standard should be less demanding than that for withholding. Citing *In re Dunar*, *supra*, the agency stated that the purpose of the asylum regulations "is to require the applicant, who has the burden of proof, to substantiate that the fear of persecution is well-founded" by "adduc[ing] evidence supporting the likelihood of persecution," and that any difference in language was merely one of "semantics." 44 Fed. Reg. 21253, 21257 (1979). Once deportation or exclusion proceedings had begun, the regulations clearly contemplated that asylum and withholding of deportation would be equivalent forms of relief. See 8 C.F.R. 108.3(a) (1980); 44 Fed. Reg. at 21255, 21257. Given this understanding of the asylum provision, it is inconceivable that Congress could have intended a lower standard for that relief than was required for withholding of deportation.

**2. *It would be anomalous to make asylum available on a lesser showing of persecution than is required for withholding of deportation***

Not only is the legislative history of the Refugee Act 1980 bereft of any indication that Congress intended that asylum would change the substantive standard for obtaining relief from deportation, such a change would make no sense as a matter of policy. The interpretation adopted by the court below would render Section 243(h)—the center-

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country where he would be persecuted]."). This further supports our understanding, and that of the Board, that Congress viewed asylum as equivalent, in all relevant respects, to withholding of deportation once deportation or exclusion proceedings had begun.

piece of our domestic legislation implementing this country's international obligations under Article 33 of the Convention—virtually superfluous, and it would make the greater relief afforded by asylum available to aliens facing a lower probability of persecution than is necessary to obtain the lesser benefit of withholding of deportation. Congress surely did not intend such anomalies. Rather, as the Board concluded in *In re Acosta-Solorzano*, *supra* (Pet. App. 58a n.13), "Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibility for these forms of relief to be essentially comparable."

Congress amended Section 243(h) in 1980 to conform it to Article 33 of the Convention. *Stevic*, 467 U.S. at 421; H.R. Rep. 96-608, *supra*, at 18; S. Rep. 96-590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. 96-781, 96th Cong., 2d Sess. 20 (1980). As the Court held in *Stevic* (467 U.S. at 428-430 n.22), Section 243(h) implements our international obligation not to return aliens to countries where they would be persecuted. Asylum, by contrast, is not addressed in the Convention. Office of the United Nations High Commissioner for Refugees, *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 7 (Geneva 1979).

Were the asylum provision to be given the construction adopted by the court below, the withholding provision, with its more demanding burden of proof, would "atrophy into a useless legal appendage." Note, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 Cin. L. Rev. 943, 964 (1986) (footnote omitted). Since any alien who could establish a likelihood of persecution sufficient to obtain withholding would, *a fortiori*, have established the requisite persecution to be eligible for asylum, with its greater benefits, the avail-



ability of withholding would be virtually meaningless.<sup>13</sup> Such a result, of course, contravenes "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973); see, e.g., *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981).<sup>14</sup> And it is particularly contrary to congressional intent here, since it would usurp the role of the withholding provision, which has been in the law for decades (e.g., 8 U.S.C. (1952 ed.) 1253(h); see *Stevic*, 467 U.S. at 414 n.5), in favor of the asylum provision, which was added as "almost an afterthought" to the 1980 Act (Aleinkoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 J.L. Reform 183, 184 (1984)).

<sup>13</sup> The asylum regulations do provide the Attorney General with discretion to deny asylum in limited circumstances where an alien has shown a likelihood of persecution, such as where he was firmly resettled elsewhere or was guilty of wrongdoing, such as fraud. See 8 C.F.R. 208.8(f)(ii); *In re Salim*, 18 I. & N. Dec. 311 (1982); *In re Lam*, 18 I. & N. Dec. 15 (1981). Even in the absence of Section 243(h), however, it is inconceivable that the Attorney General would actually deport a person eligible for such relief (and not disqualified by prior misconduct; see 8 U.S.C. 1253(h)(2); 8 C.F.R. 208.8(f)(iii)-(vi)) to the country of persecution. Rather, the asylum provisions presumably would be applied in a manner that would prevent deportation but would deny additional discretionary benefits such as adjustment of status. In any event, there is absolutely no indication that Congress had such a limited purpose in mind for Section 243(h).

<sup>14</sup> In *Flores v. INS*, No. 84-4767 (5th Cir. Apr. 11, 1986), the court of appeals concluded that this canon supports different standards for withholding and asylum because the definition of refugee in Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), refers to "persecution or a well-founded fear of persecution." In the court of appeals' view, this disjunctive was intended to encompass any alien who could demonstrate either a likelihood of persecution ("persecution") or a

As we have noted, asylum provides significant benefits that are not available to aliens who have obtained only withholding of deportation. In particular, asylees are eligible to adjust their status to that of permanent residents. Permanent residents may not (in the absence of misconduct) be deported to any country. By contrast, the relief afforded by Section 243(h) bars deportation only to the country or countries in which the alien faces a likelihood of persecution. See Section 209(b) of the Act, 8 U.S.C. 1159(b); 8 C.F.R. 209.2; *In re Salim*, 18 I. & N. Dec. 311, 315 (1982). It would make no sense to attribute to Congress an intent to make the greater relief of Section 208 available to aliens who face a lower probability of persecution than is necessary to obtain relief under Section 243(h). And in any event, the anomaly that would be created by an alternative interpretation surely supports the Board's reading of the statute to make the burdens of proof under the two sections equivalent.

The court below suggested that asylum should be available on a less compelling showing of persecution than is necessary to obtain the mandatory relief of withholding of deportation because the Attorney General has discretion to deny asylum even to aliens who have met the standard. Pet. App. 6a-7a; see also *Carvajal-Munoz v. INS*,

reason for fearing persecution ("well-founded fear of persecution"). See Slip op. 4955 n.8; see also *id.* at 4953. This odd reading of the statute is wholly unsupported by its legislative history, which the court of appeals failed to cite. Use of the term "persecution" in the definition was not intended to establish a "well-founded fear" as an alternative, less demanding standard of proving a probability of future persecution; such a reading would have made the "persecution" branch of the refugee definition completely superfluous. Rather, "persecution" refers only to the situation where the alien had, in fact, been persecuted in the past or is presently experiencing persecution. It says nothing of the meaning of the well-founded fear standard. See H.R. Rep. 96-608, *supra*, at 9; S. Rep. 96-590, *supra*, at 19; H.R. Rep. 96-781, *supra*, at 19.



743 F.2d 562, 575 (7th Cir. 1984). This suggestion is ill founded. Before 1980, the withholding provision was framed in discretionary terms, yet the Attorney General had never exercised that discretion to deny relief to an alien within its provisions. *Stevic*, 467 U.S. at 419 n.11. There is nothing in the legislative history on which to base an inference that Congress would have expected the Attorney General to use discretionary denials of asylum to rationalize the statutory scheme by authorizing the deportation of aliens who meet the requisite showing of persecution for asylum. Thus, while the other benefits of asylum might be denied on discretionary grounds (see page 20 note 13, *supra*), Congress surely did not contemplate that aliens would, as a matter of discretion, be deported to countries where they face persecution.<sup>15</sup> This leads, again, to the unreasonable conclusion entailed by the decision below that Congress established two mutually independent means for avoiding deportation, rendering the more demanding of the two superfluous.

**3. Congress intended in 1980 that the well-founded fear standard would continue to be interpreted as equivalent to the likelihood or clear probability standard**

The only possible basis for concluding that the eligibility standards for withholding of deportation and asylum diverge is that Section 208(a), 8 U.S.C. 1158(a), requires

<sup>15</sup> Under court of appeals' decision, an alien might establish a sufficient probability of persecution to be eligible for asylum but not for withholding of deportation. The Attorney General would therefore be required, in effect, either to renounce his statutory discretion to deny asylum in those circumstances for aliens who are otherwise eligible for such relief or to deport eligible aliens who have established a well-founded fear (though not a likelihood) of persecution. A choice between these unpleasant alternatives would be avoided by the Board's interpretation of the statute.

that an alien be a refugee, defined in Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), as a person with a "well-founded fear of persecution," in order to qualify for asylum, while Section 243(h), 8 U.S.C. 1253(h), requires that the alien establish that his "life or freedom would be threatened" in the country of deportation in order to be eligible for withholding relief.<sup>16</sup> This difference in terminology, however, does not reflect any difference in the substantive standard that Congress intended to be applied. Rather, consistent with the structure of the Act (see pages 12-22, *supra*), Congress clearly intended that the well-founded fear standard would continue to be interpreted, as it had been before, to require the same showing of a likelihood or clear probability of persecution that had always been necessary to obtain withholding of deportation.<sup>17</sup> As the Board concluded in *In re Acosta-Solorzano*, *supra* (Pet. App. 50a), "[s]ince there is no indication that Congress intended to depart from the accepted judicial and administrative construction of 'a well-founded fear of persecution' and since this construction is consistent with the U.N. Convention and the Protocol, \* \* \* [there is] no valid reason for departing from the construction of the well-founded-fear standard that prevailed in this country prior to the Refuge Act of 1980." See generally *Lorillard v. Pons*, 434 U.S. at 581.

a. The history of United States refugee law and practice prior to 1980 is recounted in *Stevic*, 467 U.S. at 414-420. Before 1968, aliens in this country seeking withholding of deportation were required to show a clear

<sup>16</sup> Both forms of relief are limited to persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A), 1253(h).

<sup>17</sup> The "likelihood" and "clear probability" formulations have always been used interchangeably; both require a showing that persecution is more likely than not to occur. See *Stevic*, 467 U.S. at 419-420 & n.12, 421-422, 424 & n.19; *In re Acosta-Solorzano*, *supra*, (Pet. App. 56a).

probability or a likelihood of persecution. *Id.* at 414-415. This burden required an alien not only to state his subjective fears of persecution but also to substantiate them with objective evidence that he would be singled out for persecution upon his return. See, e.g., *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *In re Janus and Janek*, 12 I. & N. Dec. 866 (1968).

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, which binds signatories not to return any "refugee" to a country where his life or freedom would be threatened. See page 13 & note 7, *supra*; *Stevic*, 467 U.S. at 416-418. The definition of refugee under the Protocol employs the well-founded fear standard. The Senate gave its advice and consent to our accession to the Protocol on the express understanding that such action would not alter or enlarge the substance of our immigration laws. See S. Exec. Rep. 14, 90th Cong., 2d Sess. App. 4, 6, 7, 10 (1968); S. Exec. Doc. K, 90th Cong., 2d Sess. III, VIII (1968). Similarly, the President and the Secretary of State advised the Senate (*id.* at III, VII) that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Thus, as the Court concluded in *Stevic* (467 U.S. at 417), "[t]he President and the Senate believed that the Protocol was largely consistent with existing law."

In 1973, the Board of Immigration Appeals considered whether the well-founded fear standard established by our accession to the Protocol required modification of the likelihood or clear probability standard that had formerly been applied to aliens seeking withholding of deportation. In *In re Dunar*, 14 I. & N. Dec. 310, the Board concluded, consistent with the understanding in 1968 that our law already conformed to the Protocol, that the standards are not materially different. See *Stevic*, 467 U.S. at 418-420. Accordingly, the Board rejected the alien's contention that "[t]his change in terminology [to a well-founded fear of

persecution] relieves the alien of the burden of showing a clear probability of persecution," and it concluded that "the crucial question is whether the [alien's] testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted." 14 I. & N. Dec. at 319.<sup>18</sup> Following *In re Dunar*, the courts of appeals similarly concluded that accession to the Protocol did not alter the standard for establishing eligibility for withholding of deportation, and, like the Board, they used the well-founded fear terminology interchangeably with the clear probability and likelihood language. *Stevic*, 467 U.S. at 419-420 & n.12; see, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132-134 (5th Cir. 1978); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).<sup>19</sup>

b. "The principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States." *Stevic*, 467 U.S. at 425. To that end, Congress eliminated the geographical and ideological restrictions as well as the unsystematic reliance on the Attorney General's parole authority that had previously characterized this country's admission of refugees from overseas. See page 13 note 6, *supra*; *Stevic*, 467 U.S. at 415-416. Congress replaced this patchwork with a unified admissions policy whereby virtually all refugees admitted to the United States enter pursuant to Section 207 of the

<sup>18</sup> See also *In re Chumpitazi*, 16 I. & N. Dec. 629, 631 (1978); *In re Francois*, 15 I. & N. Dec. 534, 538 (1975); *In re Chukumerije*, 15 I. & N. Dec. 520, 522-523 (1975).

<sup>19</sup> In *Carvajal-Munoz v. INS*, *supra*, the Seventh Circuit retreated in some respects from its earlier decision in *Kashani*. See 743 F.2d at 573-574. The crucial question, however, is the state of the law in 1980, when Congress added the well-founded fear standard to the Act. At that time, every court to have considered the question concluded that the standard was not meaningfully different from the clear probability or likelihood standard.



Act, 8 U.S.C. 1157, after screening and selection abroad, subject to numerical limitations set by the President in consultation with Congress.

By contrast, Congress evinced no intent to alter the law concerning aliens already within this country or at its borders who desired to avoid deportation or return to a country in which they feared persecution. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981). Rather, Congress expressly intended simply to conform United States domestic law to reflect its international obligations under the United Nations Protocol. See H.R. Rep. 96-608, *supra*, at 17-18, quoted in *Stevic*, 467 U.S. at 426-427 n.20; see also, *e.g.*, 125 Cong. Rec. 35814-35815 (1979) (remarks of Rep. Holtzman). As the Senate Report stated, "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. 96-256, *supra*, at 9; see also *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (testimony of David Martin, Department of State) ("[f]or purposes of asylum, the provisions in this bill do not really change the standards"). This congressional design is confirmed by the conference reports, which explain that Section 243(h), as amended, was "based directly upon the language of the Protocol and [was] intended [to] be construed consistent with the Protocol." S. Rep. 96-590, *supra*, at 20; H.R. Rep. 96-781, *supra*, at 20.

By the same token, both the House and Senate reports make clear that the new definition of "refugee" contained in Section 101(a)(42)(A) was intended simply to conform to the definition in the Protocol. H.R. Rep. 96-608, *supra*,

at 9; S. Rep. 96-256, *supra*, at 4, 14-15.<sup>20</sup> Nowhere in the legislative history of the Refugee Act is there any suggestion that the use of the phrase "well-founded fear of persecution" was intended to alter the standard by which an alien was required to prove eligibility for withholding of deportation or for asylum. Rather, the legislative history indicated that the only change Congress contemplated would result from incorporation of the United Nations' definition was the elimination of the discrimination inherent in the ideological and geographical restrictions that had previously been placed on conditional entry into this country. See *Stevic*, 467 U.S. at 415, 427.<sup>21</sup>

<sup>20</sup> See also, *e.g.*, *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) ("[w]hat we have done in the administration bill is simply incorporated the United Nations definitions for 'refugee'"); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 43 (1979) (remarks of Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs) (the bill "essentially adopts the definition in the United Nations Protocol Relating to the Status of Refugees").

<sup>21</sup> See also, *e.g.*, *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) (new definition "supplants the definition in the immigration statute right now which limits 'refugee' to certain geographical areas of the world"); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (remarks of Rep. Fish) ("the fundamental change under the legislation, of course, is the replacing of the existing definition of refugee with the definition which appears in the United Nations Convention and Protocol on refugees, thus eliminating ideological and geographical limitations"); S. Rep. 96-256, *supra*, at 15; H.R. Rep. 96-781, *supra*, at 1, 9. While the focus of the inquiry may not have



This discussion of pre-Refugee Act law, our accession to the United Nations Protocol in 1968, and the legislative history of the 1980 Act demonstrates that in 1980, just as in 1968, Congress did not intend to alter the prevailing standard by which an alien in this country or at its borders was required to prove eligibility for preventing his deportation either through withholding relief or through asylum. Congress understood that the well-founded fear standard had consistently been construed as equivalent to the likelihood or clear probability standard, and there is nothing to suggest that it meant to upset this settled administrative and judicial interpretation in 1980. There is, accordingly, no basis for construing the well-founded fear standard incorporated under Section 208(a) to create the anomalies, discussed above, of rendering Section 243(h) superfluous and granting aliens facing a less substantial probability of persecution than is necessary for relief under Section 243(h) the greater benefits afforded by asylum.

**C. The Use Of A Lower Eligibility Standard For Asylum Than For Withholding Of Deportation Would Be Administratively Unworkable**

Not only is the establishment of a lower burden of proof for asylum than for withholding of deportation contrary to Congress's intent, its implementation would be both impractical and unduly burdensome. There is at bottom no meaningful burden of proof that can be applied short of the likelihood standard already in effect. And the dual adjudicatory scheme required by the court of appeals' rule would be cumbersome, expensive, and of little utility.

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been identical, none of the administrative decisions under former Section 203(a)(7) of the Act, which had permitted the conditional entry of refugees from Communist-dominated or Middle Eastern countries, holds that an alien was eligible for such relief on a lesser showing of a likelihood of persecution than was and is required under Section 243(h).

1. The court of appeals has done little to give substance to its preferred burden of proof in asylum cases beyond observing that it is " 'more generous' " (Pet. App. 6a (citation omitted)) than the burden for withholding of deportation and that it requires a "reasonable possibility"—something short of a "likelihood"—that the alien would be persecuted. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985); see also Pet. App. 11a (evidence must "suggest a risk of persecution"); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) (evidence must show that the alien has "a good reason to fear that he or she will be singled out for persecution"). In mandating such an ill-defined standard, the court of appeals ignored what years of experience adjudicating persecution claims have taught the Board of Immigration Appeals: "the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made." *In re Acosta-Solorzano, supra* (Pet. App. 56a). In the final analysis, the Board concluded, "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." *Ibid.*

The Board carefully explained that the clear probability or likelihood standard, though described as requiring a showing that persecution is more likely than not to occur, does not, in practical application, "require[] an alien to establish to a particular degree of certainty \* \* \* that he will become a victim of persecution." Pet. App. 51a-52a. Accordingly, as the Board went on to discuss, the interpretation of the well-founded fear standard to mandate a lower probability of persecution than is required for withholding of deportation is fundamentally misguided:

Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of

persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution.

*Id.* at 56a. The Board also described in detail the type of showing that an alien must make "as a practical matter":

[T]he evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor had the inclination to punish the alien.

*Id.* at 52a. The Board also noted that its standard "is nearly identical to that proposed by the authority on international refugee law, Atle Grahl-Madsen, in his treatise on the meaning of the U.N. Convention and the Protocol."

*Id.* at 48a; see 1 A. Grahl-Madsen, *The Status of Refugees in International Law* §§ 76, 77 (1966).<sup>22</sup>

<sup>22</sup> The Board further observed that a lower burden of proof is inconsistent with the intent of the drafters of the United Nations Convention, who rejected formulations of the well-founded fear standard that would have required only that the alien's fear be "plausible," "justifiable," or "reasonable." Pet. App. 49a n.11; see, e.g., United Nations Economic and Social Council, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems*, U.N. Doc. E/AC.32/L.38, at 33-34 (Feb. 15, 1950). Like the rules in the Ninth and Seventh Circuits, the standard recently adopted by the Fifth Circuit in *Flores v. INS*, *supra*, which requires an alien to demonstrate only that his fear of persecution has "some basis in the reality of the circumstances" or that a reasonable person would fear persecution (slip op. 4953), is contrary to this history of the Convention.

Thus, the court of appeals, in requiring a lower burden of proof for asylum cases, failed to appreciate both the reasoning used by the Board in adjudicating these cases and the fact that there is no meaningful way in which to define a lower standard that would be independent of the likelihood test applicable to withholding of deportation. While the court of appeals' test may, in its view, have theoretical virtue merely as a matter of terminology, it simply does not come to grips with the realities of adjudicating persecution claims, a matter in which the Board is expert and in which its conclusions must not be lightly overridden. In addition, the court of appeals' test is inherently vague in application: it requires a showing of something less than a 50% probability of persecution, but how much less is undefined. See *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986) (well-founded fear standard requires a "showing [that] may be slightly less than" a clear probability); *Carvajal-Munoz v. INS*, 743 F.2d at 574-575 ("evidentiary burden [for asylum] is very similar to that connected with the 'clear probability' standard, [but] it is not identical"); see also *Stevic*, 467 U.S. at 424 (noting the "somewhat amorphous" positions of the respondent and amici with respect to the burden of proof required by the well-founded fear standard). Without the benchmark provided by the likelihood or clear probability standard, the Board will be left without sufficient guidance as to how it should be evaluating persecution claims.

2. Finally, the court of appeals' approach would unnecessarily require dual adjudication of each alien's persecution claim. Under the Board's interpretation of the statute, there is a single, uniform assessment of the alien's eligibility for barring his deportation. This has enormous practical significance for the nation's 60 immigration judges and the Board, who are already burdened by the adjudication of over 100,000 deportation cases, including more than 10,000 asylum claims, each year without being



required to weigh the same evidence under two different standards. The costs of such an approach would be greatly magnified, moreover, were the Court to adopt the suggestion of the Seventh Circuit in *Carvajal-Munoz v. INS*, *supra*, that asylum and withholding of deportation requests be considered in two entirely separate hearings. 743 F.2d at 570. Even if, contrary to our submission, the Court were to conclude that different burdens of proof apply, it would make little sense, in view of the closely related purposes served by asylum and withholding of deportation and the identical evidence of persecution relevant to both forms of relief, to impose the additional costs of separate hearings or similar independent, parallel consideration of the request for relief in any particular case.

### CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court for disposition under the correct legal standard.

Respectfully submitted.

CHARLES FRIED

*Solicitor General*

RICHARD K. WILLARD

*Assistant Attorney General*

CAROLYN B. KUHL

*Deputy Solicitor General*

BRUCE N. KUHLIK

*Assistant to the Solicitor General*

LAURI STEVEN FILPPU

DAVID V. BERNAL

*Attorneys*

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In The  
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October Term, 1985

IMMIGRATION AND NATURALIZATION SERVICE,

*Petitioner,*

v.

LUZ MARINA CARDOZA-FONSECA,

*Respondent.*

**BRIEF OF RESPONDENT**

DANA MARKS KEENER

Member, Bar of U.S. Supreme Court

KIP STEINBERG

Member, Bar of the

Supreme Court of California

*Attorneys for Respondent*

SIMMONS & UNGAR

517 Washington Street

San Francisco, CA 94111

(415) 421-0860

SUSAN M. LYDON

Member, Bar of the

Supreme Court of California

BILL ONG HING

Member, Bar of U.S. Supreme Court

Immigrant Legal Resource Center

Stanford Law School

Stanford, CA 94305

(415) 723-4459

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**QUESTION PRESENTED**

Is there a difference between the "well-founded fear of persecution" standard applied to requests for asylum under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), and the "clear probability" standard applicable to requests for withholding of deportation under section 243(h) of the Act, 8 U.S.C. § 1253(h) ?

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## STATEMENT

Luz Marina Cardoza-Fonseca is a native and citizen of Nicaragua who last entered the United States as a visitor on June 25, 1979. She remained longer than her authorized stay, and deportation proceedings were instituted.

At a hearing before an immigration judge on December 14, 1981, Respondent conceded deportability, applied for asylum pursuant to § 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and applied for withholding of deportation pursuant to § 243(h) of the Act, 8 U.S.C. § 1253(h).

Respondent testified that she holds a political opinion which is opposed to the Sandinista regime. (Administrative Record, hereinafter "AR", 72 and 73.) She believes that her political opinion is likely to be brought to the attention of the authorities in Nicaragua because of her close relationship with her brother who is a political opponent of the Sandinista government. (AR 58, 59.) Her brother had previously been a Sandinista, but during the Somoza regime, he was betrayed by his former Sandinista comrades and was arrested and tortured. (AR 34, 37, 40, 42.) After this denunciation, Respondent's brother renounced his affiliation to the Sandinista movement, and publicly criticized its progression towards communism. (AR at 38, 39, 40, 42.) He subsequently came to the United States and applied for asylum. (AR 31.)

Respondent fears that, if she returns to Nicaragua, the Sandinista regime will persecute her to retaliate against her brother, or to try to extract information from her which the Sandinistas believe he has told her. (AR 50, 51, 55, 58, 59.) Relatives in Nicaragua advised Respondent it was too dangerous for her to return, and that the Sandinistas were still vigorously searching for her brother. (AR 58, 59.)



The immigration judge applied a clear probability standard of proof to Respondent's applications for asylum and withholding of deportation, and denied both requests.

The Board of Immigration Appeals (hereinafter, "the Board") dismissed Respondent's appeal, agreeing with the immigration judge. The Board ignored Respondent's argument that the clear probability standard was the wrong standard to apply to the asylum request, and ruled that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood'" of persecution. (AR 3). The Board subsequently explained this terminology by stating that "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge". *Matter of Acosta*, Int. Dec. No. 2986, p. 25 (1985).

The Court of Appeals reversed the Board's decision and remanded for further proceedings, *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1455 (9th Cir. 1985). It held that the well-founded fear standard applicable to asylum claims is more generous than the clear probability standard applicable to withholding of deportation. *Id.* at 1453. Therefore, the Court of Appeals found that the Board of Immigration Appeals erred by applying the clear probability standard of proof to Respondent's asylum application, and remanded the asylum claim for consideration under the proper legal standard. *Id.* at 1455.

### SUMMARY OF ARGUMENT

The Refugee Act of 1980 incorporated into U.S. law the internationally accepted definition of "refugee". This definition requires proof of a "well-founded fear of persecution". 8 U.S.C. § 1101(a)(42)(A). Under the scheme

of the Immigration and Nationality Act, this definition applies to overseas refugee admissions (§ 207) and asylum (§ 208). The well-founded fear standard is distinct from the clear probability standard which this Court held in *INS v. Stevic*, 467 U.S. 407 (1984), to be applicable to withholding of deportation (§ 243(h)). The court below, and three of the four other circuit courts which have considered this issue, have concluded that the well-founded fear standard is more generous than the clear probability standard. This interpretation conforms to Congress' intent as expressed in the plain language, statutory scheme, and legislative history of the statute. The historical origins of this standard in U.S. and international law also support this conclusion.

Starting with the plain language of the statute, the well-founded fear standard for asylum and the clear probability standard for withholding are obviously different. In using different language, Congress must be presumed to have intended to create distinct standards. See *Russello v. United States*, 464 U.S. 16, 21 (1983). The scheme of the Immigration and Nationality Act, in which asylum and withholding of deportation each play a unique role, further reinforces this presumption.

The legislative history of the asylum statute demonstrates that Congress purposefully incorporated the well-founded fear standard from the United Nations Protocol Relating to the Status of Refugees and directed that the language be interpreted consistently with the Protocol. On the other hand, there is not a shred of evidence in the legislative history to support the Petitioner's argument that Congress considered the well-founded fear standard to be equivalent to the clear probability standard for withholding of deportation.

Historically, our refugee admission laws have provided a more generous standard than the clear probability standard. *See, e.g., Matter of Tan*, 12 I.&N. Dec. 564 (BIA 1967) and *Matter of Ugricic*, 14 I.&N. Dec. 384 (Dist. Dir. 1972). In mandating a well-founded fear standard for asylum but not for withholding of deportation, Congress continued the historical distinction between the standards of proof for refugee admissions and withholding of deportation.

The decision below also comports with the intent of Congress that the refugee standard be interpreted consistently with the U.N. Protocol. Both the history of the Protocol and the United Nations' own interpretations found in the U.N. *Handbook on Procedures and Criteria for Determining Refugee Status*, reject the purely objective, balancing of probabilities approach championed by the Petitioner.

In *INS v. Stevic*, 467 U.S. 407 (1984), this Court recognized that the asylum and withholding of deportation provisions of the Immigration and Nationality Act were independent, each with a distinct history, purpose, and language. *Id.* at 425-428. Although the meaning of the well-founded fear standard was not decided in *Stevic*, the reasoning of the case supports the decision of the court below that the standard is more generous.

The agency's construction of the statute frustrates the expressed intent of Congress to adopt the more generous standard of the U.N. Protocol. Moreover, Congress did not delegate to the Executive the discretion to determine the substantive standard of proof for asylum. This Court, therefore, should not defer to the agency's position that the two standards are identical. *See Espinoza v Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973).

Congress expressly intended to codify in the Refugee Act of 1980 the U.N. interpretation of the well-founded

fear standard. In accordance with this intent, the Ninth Circuit correctly held that asylum applicants need only submit evidence which would lead a reasonable person to believe that he or she may be persecuted, i.e., that persecution is a reasonable possibility.

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## ARGUMENT

### I.

#### **THE PLAIN LANGUAGE OF THE STATUTE AND AN ANALYSIS OF THE STATUTORY SCHEME DEMONSTRATE THAT THE WELL-FOUNDED FEAR OF PERSECUTION STANDARD IS MORE GENEROUS THAN THE CLEAR PROBABILITY OF PERSECUTION STANDARD.**

##### **A. The Plain Language Of The Asylum Statute Is Distinct From The Statute For Withholding Of Deportation.**

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1982), (hereinafter, the "Act") provides two independent statutory mechanisms for persons at or inside the borders of the United States who claim a fear of persecution if returned to their country of origin. The asylum statute, § 208 of the Act, 8 U.S.C. § 1158, requires that an alien must show a "well-founded fear of persecution". *See* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982). The other statute, § 243(h) of the Act, 8 U.S.C. § 1253(h) (1982), provides for withholding of deportation, but does not specify a standard. Section 243(h) has been interpreted by this Court to require proof that persecution is "more likely than not". *INS v. Stevic*, 467 U.S. 407, 429-430 (1984).

Petitioner contends that "the standards . . . are not meaningfully different", Pet. Brief at 7, however, the language of the statute and the statutory scheme demonstrate that Congress considered the well-founded fear



standard to be more generous. In *Stevic*, this Court ruled that the well-founded fear of persecution standard did not apply to § 243(h), and therefore did not decide the meaning of the standard.

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107, amended § 243(h).<sup>1</sup> This amendment was merely to clarify the mandatory nature of our *non-refoulement* obligation (prohibition on return or expulsion of refugees) under Article 33 of the United Nations Convention,<sup>2</sup> thus § 243(h) remained in force as it had been under previous law. *Stevic*, 467 U.S. at 421, 427-428.

In contrast to the minor clarification made to § 243(h), the Refugee Act of 1980 repealed the predecessor refugee admissions statute, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976),<sup>3</sup> and replaced it with two new provisions: § 207,

<sup>1</sup>Withholding of deportation under § 243(h) has existed in various forms since 1950. See, *Stevic* 467 U.S. at 424-415. It is available only before an immigration judge to an otherwise deportable alien who demonstrates a clear probability of persecution in his or her home country. *Id.* at 430. When granted, withholding of deportation merely results in a temporary bar on deportation to the specific country where persecution is likely to occur. The Immigration and Naturalization Service (hereinafter "INS") is free to enforce departure to another country if it can be arranged, or to that same country if conditions change. See *Matter of Lam*, 18 I.&N. Dec. 15 (BIA 1981).

<sup>2</sup>In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, (hereinafter the "Protocol"). The Protocol bound parties to comply with the substantive provisions of Article 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) (hereinafter the "Convention").

<sup>3</sup>Section 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976), provided 17,400 immigrant visas per year to refugees fleeing from Communist-dominated countries or areas in the Middle East "because of persecution or a fear of persecution on account of race, religion or political opinion." Applications were made to the district director, and neither immigration judges nor the Board had jurisdiction over such claims. *Stevic*, 467 U.S. at 415-416 and n. 8.

which provides for the admission of refugees from abroad and § 208, which for the first time established a statutory mechanism for the admission of refugees at or inside our borders. See 8 U.S.C. §§ 1157, 1158 (1982). S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 17-18 (1979). Both refer in specific terms to a new definition of refugee contained in § 101(a)(42)(A), which provides as the operative standard, "persecution or a well-founded fear of persecution." (emphasis added). 8 U.S.C. § 1101(a)(42)(A) (1980).

Although there is no textual basis for its claim, Petitioner here asserts that the well-founded fear of persecution standard for asylum should be equated with the clear probability standard for withholding under § 243(h). An established canon of statutory construction admonishes that the starting point in every case is the language employed by Congress in the statute itself. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). In the absence of a clearly expressed Congressional intent to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Under this criterion alone, the Petitioner's position can be completely dismissed.

Although Congress clearly intended that the well-founded fear of persecution standard be applied to the new asylum provision in § 208, it significantly did not change the withholding of deportation provision of § 243(h) to incorporate the well-founded fear language when the Refugee Act of 1980 was enacted. *INS v. Stevic*, 467 U.S. 407, 423-424. From the plain language of the Act, "well-founded fear" applies to asylum under § 208 but does not apply to § 243(h) withholding. *Id.*



The well-founded fear standard is not specifically defined or described elsewhere in the legislation.<sup>4</sup> But where a term used in a statute is not specifically defined, the Court is "compelled to start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. 16, 21 (1983) quoting *Richards v. United States*, 369 U.S. 1, 9 (1962). See also, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-199 (1976) (specifically rejecting the addition of "a gloss to the operative language of the statute quite different from its commonly accepted meaning").

The Oxford English Dictionary defines "well-founded" in regard to "a belief, sentiment or statement: [h]aving a foundation in fact; based on good or sure grounds or reasons." 12 Oxford English Dictionary, Sec. W, at 295 (1933). Taking the plain language of the two statutes, the Court of Appeals concluded that the "difference in language . . . makes [the] contrast between the two tests apparent." *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985). See also *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282-1283 (9th Cir. 1984) (difference in language between section 243[h] and section 208 strongly supports the conclusion that the standard under the latter is more liberal).

The plain language of § 243(h) is in sharp contrast to the well-founded fear provision of the asylum statute. Section 243(h) does not use the term "refugee", nor refer to § 101(a)(42)(A); it does not incorporate by reference nor specifically mention the well-founded fear of persecution language. By the very terms of the statute, withholding of deportation is available only if the alien's life or freedom

<sup>4</sup>Although the well-founded fear standard is not specifically defined, Congress has directed that this section was to be "construed consistent with the Protocol," from which the language was adopted. S.Rep. No. 590, 96th Cong., 2d Sess. 20 (1980).

"would" be threatened, but not if the alien only shows he or she "could" be subject to persecution. Well-founded fear, by its plain language, connotes a lesser degree of certitude than the "more likely than not" level of certainty that the Court has held applies to the withholding of deportation statute.

Due to these significant differences, this Court in *Stevic* found "no textual basis in the statute for concluding that the well-founded fear of persecution standard is relevant to a withholding of persecution claim under § 243(h). *INS v. Stevic*, 467 U.S. 407, 423-424 (1984). Respondent submits that the converse of this observation is also true, i.e., there is no textual basis in the statute for concluding that the clear probability standard is relevant to an application for asylum under § 208.

Congress explicitly incorporated the well-founded fear language into § 208 (asylum) but not into § 243(h) (withholding). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

Petitioner boldly asserts that this difference in terminology does not reflect that Congress intended to create a substantively different standard for the newly-established asylum statute. Pet. Brief at 23. However, a meaning different from the one actually expressed in the chosen language of a statute should not be incorporated casually; Congress is presumed to have utilized specific language appropriate for the meaning it intended when drafting a statute. *Haynes v. United States*, 390 U.S. 85, 92 (1968). If, as Petitioner suggests, the "ordinary meaning of the words used"

is not to be applied, an explicit statement of congressional intent in the legislative history in that regard is required. See *INS v. Phinpathya*, 464 U.S. 183 (1984). No such explicit statement can be found.

**B. Petitioner's Position Is Incompatible With The Legislative Scheme Of The Refugee And Asylum Provisions Of The Immigration And Nationality Act.**

The entire legislative scheme reflects Congress' desire to extend uniform treatment to refugees, regardless of where they are physically situated at the time of their application. By specifying the identical well-founded fear standard of proof in § 207 (refugees processed abroad) and § 208 (asylum), Congress obviously intended to extend to refugees within our borders the same more generous standard it had historically applied to refugees who sought entrance from abroad.

Petitioner argues that Congress created the asylum provision only as a means of permitting aliens who qualify for withholding of deportation to gain lawful permanent resident status. Pet. Brief at 6. Had that been the result intended by Congress, it surely would have been simpler to amend the existing withholding provision of § 243(h) to allow a discretionary grant of lawful permanent resident status some time after the initial grant of relief. Instead, Congress made a considered decision to establish a new asylum status independent of § 243(h) withholding.

The new asylum provision was clearly different from the existing withholding of deportation relief. Aside from the different standards of proof, there are other distinct aspects to these statutory provisions. While withholding of deportation is located in Chapter 5 of the Immigration and Nationality Act which deals with deportation, the asylum provision is located with the refugee admissions pol-

icies in Chapter 1.<sup>5</sup> Unlike § 208 (asylum) which is discretionary, § 243(h) (withholding) is mandatory. Section 243 (h) requires a showing of threat to "life or freedom", whereas § 208 includes a broader concept of persecution. See *INS v. Stevic*, 467 U.S. 407, 421, n.15 and 428-429, n.22 (1984). Furthermore, asylum can be sought administratively from the INS district director, while withholding is exclusively a deportation relief. Once granted, asylum qualifies an alien for lawful permanent resident status while withholding does not. See 8 C.F.R. § 208.9.

Congress has established two different statutes with two different roles in the legislative scheme. Thus it is apparent that Petitioner's analysis which equates these two different statutes is fundamentally flawed.

## II.

**THE ORIGINS AND LEGISLATIVE HISTORY OF § 208 DEMONSTRATE THAT CONGRESS INTENDED TO RETAIN A MORE GENEROUS STANDARD OF PROOF FOR REFUGEES.**

**A. Congress Specifically Intended To Establish An Asylum Provision Which Incorporates The Well-Founded Fear Standard Of Proof Derived From The Internationally Accepted Definition Of Refugee.**

The Refugee Act of 1980 was an expansive piece of legislation designed to reflect one of America's oldest themes—the welcome of homeless refugees to our shores—and to incorporate our national commitment to human rights and humanitarian concerns. S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); H.R. Rep. No. 608, 96th Cong., 1st

<sup>5</sup>Petitioner also ignores the fact that its position would dramatically change the standard for refugee admissions from abroad under § 207, to which the well-founded fear standard also applies. This would be contrary to the long-established history of a liberal standard for refugee admissions. See brief of amici curiae, The International Human Rights Law Group and Washington Lawyers Committee for Civil Rights Under Law.



Sess. 2 (1979). The legislative history of The Refugee Act shows unequivocally that Congress intended to codify our country's adherence to the United Nations Convention and Protocol when drafting the new asylum provision.<sup>6</sup> Therefore, in selecting the same well-founded fear definition of refugee as the underlying criterion for eligibility for both § 207 (refugee admissions from abroad) and § 208 (asylum), Congress chose the definition from the Convention and Protocol and specifically directed that the provision be interpreted consistently with the Protocol. S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); S. Rep. No. 256, 96th Cong., 1st Sess. 14-15 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979). The legislative history of the Refugee Act of 1980 is also replete with criticism of the ideological and geographic limitations of the prior law governing refugees, and their elimination was considered a significant expansion in our law.<sup>7</sup>

Congress recognized that the United States had conformed its treatment of refugees with the requirements of

<sup>6</sup>In Article I, ¶ 2, the Protocol adopts the well-founded fear standard of the Convention, and defines a "refugee" as an individual who

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

<sup>7</sup>H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (remarks of Representative Fish); *id.* at 43, 51 (testimony of Ambassador Clark, U.S. Coordinator for Refugee Affairs); *The Refugee Act of 1979: Hearings on H.R. 2816 Before Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 1 (1979) (testimony of Representative Fascell); *The Refugee Act of 1979: Hearings on S 543 Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 8 and 11 (1979) (testimony of Ambassador Clark).

the Protocol *in practice*, i.e., through the use of discretionary "parole admissions" under § 212(d)(5),<sup>8</sup> but not in statute.<sup>9</sup> Finding such an ad hoc approach to be inadequate,<sup>10</sup> Congress created the new asylum provision, incorporating the internationally accepted definition of refugee contained in the U.N. Protocol.

The substance of the well-founded fear standard for refugees was not specifically addressed by Congress in the

<sup>8</sup>H.R. Rep. No. 608, 96th Cong., 1st Sess. 2 (1979). Parole under § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), was frequently utilized to admit refugees because the Executive branch found § 203(a)(7) inadequate to meet refugee crises. Section 203(a)(7)'s numerical limit of 17,400 immigrant visas was insufficient to meet the needs of deserving refugees, and its ideological and geographic restrictions (e.g., § 203(a)(7) did not apply to countries of the Western Hemisphere such as Cuba) were too limiting. The Refugee Act of 1980 maintains this parole authority, but limits it to "compelling" circumstances when § 207 cannot be used. See 8 U.S.C. § 1182(d)(5)(B) (1982).

<sup>9</sup>H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979); *House Hearings Before Immig. Subcomm.*, *supra*, at 20 (testimony of Attorney General Griffin Bell); *Senate Hearings*, *supra*, at 11, 31 (testimony of Ambassador Clark); *id.* at 18 (testimony of Michael J. Egan, Associate Attorney General). Similarly, when the United States acceded to the United Nations Protocol Relating to the Status of Refugees, the President and Secretary of State advised the Senate that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing law in the United States." S. Exec. Doc. K, 90th Cong. 2nd Sess. III, VII (1968) (emphasis added). This constitutes a recognition that neither the Convention nor the Protocol require the admission of any refugee by a contracting party, but only the guarantee of non-refoulement. See Article 33, U.N. Convention on the Status of Refugees; *INS v. Stevic*, 476 U.S. 407, 428, n. 22 (1984).

<sup>10</sup>Congress was dissatisfied with the absence of uniform treatment for refugees, which resulted in some being granted parole while others received "indefinite voluntary departure". In discussing the past statuses given to persons who qualified under the United Nations Convention and Protocol, Congress significantly did not mention withholding of deportation as a status which was applicable to refugees under prior practice, but only individual parole and "indefinite voluntary departure". S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979). Clearly Congress did not consider that withholding under § 243(h) addressed this problem.



legislative history of the Refugee Act, beyond emphasizing that it conform to the United Nations' definition. S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979). In none of the more than 1500 pages of testimony, statements, reports, and discussions which comprise the legislative history was the narrow issue raised in this case specifically addressed.<sup>11</sup> However, the scheme of the Refugee Act and the legislative history strongly support the conclusion that Congress intended the well-founded fear standard for the new asylum statute to be distinct from and "more generous" than the clear probability standard for withholding.<sup>12</sup>

Petitioner attempts to use legislative history to support its assertion that, as with § 243(h), the legislation did not change the standard for asylum. Pet. Brief at 26-27. The Petitioner relies on the fact that in 1974, the Attorney

<sup>11</sup>While there was discussion of the definition of refugee in the legislative history, it focused on another aspect of the refugee definition, that is, the elimination of the ideological and geographic restrictions which existed under our previous law. S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

<sup>12</sup>The Senate bill, S.643, 96th Cong., 1st Sess. (1979) expressly provided that an alien could not obtain asylum unless "his deportation or return would be prohibited under § 243(h)." 125 Cong. Rec. 23253 (1979). The House bill, which did not contain this language (*id* at 37244), was adopted instead. Petitioner concedes that had the Senate bill been enacted, the issue here would be unequivocally resolved. However, Petitioner attempts to minimize the significance of the choice of the House bill by claiming no substantial difference between the two provisions exists since the import of the different language was not discussed in the conference report. (See Pet. Brief at 15-16, n.10). Such an assertion turns logic upside down, as Congress surely would not have chosen to delete the specific language it intended to be operative. Moreover, Petitioner's interpretation of this action is contrary to established principles of statutory construction. Where such a specific choice of drafting is made, "it strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974). See also, *Russello v. United States*, 464 U.S. 16, 23 (1983).

General promulgated regulations for an administrative form of relief called "asylum".<sup>13</sup> The Petitioner's assertion must fail, because it overlooks a crucial point: Congress repeatedly emphasized that no uniform practice had theretofore existed for the treatment of refugees under the United Nations definition. S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 2 (1979).

The regulations as amended in 1979, required aliens seeking "asylum" and withholding of deportation to show that they "would be subject to persecution" on one of the enumerated grounds. See 8 C.F.R. § 108.3(a) (1980) (asylum), and 8 C.F.R. § 242.17(c) (1980) (withholding of deportation). Thus, the Petitioner claims that Congress intended to silently ratify this concept of a single standard of proof in the Refugee Act of 1980. See Pet. Brief at 17-18. See also, *Matter of Acosta*, Int. Dec. 2986, at 26-27 & n.13 (BIA 1985).

Petitioner's argument is a perversion of the rule of construction that when Congress reenacts a statute it may be deemed to have approved of an existing administrative construction of that statute. See generally, *Helvering v. Griffiths*, 318 U.S. 371, 395-396 & n.46 (1943). First, Con-

<sup>13</sup>There was no statutory scheme for asylum before 1980, but in 1974 (lasting effect until 1980), the Attorney General promulgated regulations for an administrative form of relief called "asylum". See 8 C.F.R. §§ 108.1, 108.2 (1976). Determination of eligibility was made by the district director in the exercise of discretion. The decision could not be reviewed by an immigration judge or by the Board, until the regulations were amended in 1979. See 44 Fed. Reg. 21253, Apr. 10, 1979 (effective May 10, 1979); 8 C.F.R. §§ 108.3(a) and (b) (1980). As initially promulgated, this provision did not contain a standard of proof. See *INS v. Stevic*, 467 U.S. 407, 420 n.13 (1984); *Carvajal-Munoz v. INS*, 743 F.2d 562, 575 n.15 (7th Cir. 1984). These regulations were repealed following the enactment of the Refugee Act of 1980 as "no longer applicable". 46 Fed. Reg. 45117 (Sept. 10,

gress did not here reenact the statute. While the Refugee Act merely changed § 243(h) from discretionary to mandatory, the asylum provision § 208 was entirely new. This new provision specified that applicants for asylum must prove a "well-founded fear of persecution", 8 U.S.C. § 1101(a)(42)(A), language which had never before been incorporated into United States statutory law.

Second, this Court has often criticized the concept of silent ratification. *See, e.g., Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"). More than mere silence in reenactment has been required, e.g. "persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance", *Boys Markets, Inc. v. Retail Clerks' Union*, 398 U.S. 235, 242 (1970), or a showing that the attention of Congress was specifically directed to the matter at hand. *Helvering v. Hallock*, 309 U.S. 106, 119-120 (1940). Petitioner cannot show that either of these requirements have been met.<sup>14</sup>

Moreover, the INS recognized that the Refugee Act had created this new and distinct standard for § 208 (asy-

<sup>14</sup>There was no authoritative interpretation establishing the standard to be applied to asylum requests under 8 C.F.R. § 108 when Congress was considering the Refugee Act of 1980. Petitioner would have the Court infer that Congress was or should have been aware of an asserted INS policy applying the clear probability standard to asylum claims based on extremely meagre evidence. Under prior law, there was no appeal of a district director's denial of asylum. *Matter of Lam*, 18 I.&N. Dec. 15, 18 n.4 (BIA 1981). Therefore, no standard was discussed in case law, nor was it specified in the pre-1979 regulations. The first mention of any standard applicable to asylum claims was in the April, 1979 regulations, which required only that an alien prove that he or she "would be persecuted." *See* 8 C.F.R. § 108.3(a) (1980). In the introductory remarks to the regulations, the INS in a short and somewhat cryptic statement attempts to equate the well-founded fear and clear probability standards. *See* 44 Fed. Reg. 21253, 21257 (1979). There is no evidence, however, that Congress was aware of or intended to ratify this one comment at the time it enacted the Refugee Act.

lum) and promulgated new regulations to require that applicants for asylum show a "well-founded fear of persecution." *Compare* 8 C.F.R. § 108.3(a) (1980), repealed as "no longer applicable", 46 Fed. Reg. 45117 (Sept. 10, 1981), *with* 8 C.F.R. § 208.5 (1981). Significantly, the INS did not alter the standard in the regulations for § 243(h). *Compare* 8 C.F.R. § 242.17(c) (1979), *with* 8 C.F.R. § 242.17(c) (1981). In fact, the only clear statement in the legislative history regarding the INS's pre-Refugee Act asylum regulations was Senator Kennedy's statement, made on the floor of the Senate the day it voted on the bill, to the effect that the "[p]resent [asylum] regulations and procedures now used by the Immigration Service *simply do not conform* to either the spirit or to the new provisions of this Act." 126 Cong. Rec. S1754 (daily ed. Feb. 26, 1980) (emphasis added). Far from showing that Congress intended to adopt existing regulatory practice, this history demonstrates a conscious choice to alter the statutory scheme.

Petitioner's interpretation is inconsistent with the fact that the new asylum provision incorporated a definition of refugee which contained a standard of proof different from the preexisting standard of § 243(h). The clear intent of Congress was that asylum status conform to the definition of refugee contained in the United Nations Convention and Protocol. "[T]he new definition . . . will finally bring United States law into conformity with the internationally accepted definition of the term 'refugee'." H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

It is well established that a statute should be interpreted in light of Congress' overriding objective for the enactment. *See e.g. Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Especially where, as here, Congress did not directly address a specific issue of statutory construction, the overall purpose and structure of



a statute becomes far more important as an indicator of legislative intent. *See e.g., Russello v. United States*, 464 U.S. 16 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Since it is abundantly clear from the legislative history that the general purpose of the Refugee Act of 1980 was to conform our law with that of the U.N. Convention and Protocol, this intent must control. To interpret this provision in any other way flies in the face of an unequivocal expression of Congressional intent.

**B. Historically, Congress Has Always Provided A Liberal Standard For The Admission Of Refugees.**

Making asylum available on a lesser showing of persecution, but as a matter of discretion, is consistent with its origins. The enactment of § 207 and § 208 with a concomitant requirement of meeting the same definition of refugee provided in § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), demonstrates that the asylum provision of § 208 has an origin identical to the refugee provision of § 207. *See* S. Rep. No. 256, 96th Cong., 1st Sess. 15 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 29 (1979). Those origins are the humanitarian efforts to resettle groups traditionally admitted from abroad prior to 1980, such as Russian Jews, Cubans, Chinese, and Southeast Asian refugees.

A generous and humanitarian standard for refugee admissions has been a part of U.S. law since the end of World War II. *See generally*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 2-5 (1979). The roots of § 207 and § 208 can be traced back to the 1946 Constitution of the International Refugee Organization, 62 Stat. 3037 (1946) (hereinafter the "IRO").<sup>15</sup> *See INS v. Stevic*, 467 U.S. 407, 415 (1984), quoting *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 52

<sup>15</sup>For a thorough discussion of this history see, generally, Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status. 10 Brooklyn J. of Int'l. Law 333, 337-352 (1984).

(1971). The IRO definition of refugee was the "point of departure" for the drafters of the 1951 U.N. Convention. *Summary Record of the Ad Hoc Committee on Statelessness and Related Problems*, U.N. Doc. E/AC.32/SR.5 at 4.<sup>16</sup> The IRO defined refugees as persons who expressed "valid objections" to returning to their country of nationality. Such valid objections included "[p]ersecution, or fear, based on *reasonable grounds* of persecution because of race, religion, nationality or political opinions . . ." (emphasis added). IRO Constitution, § C, subsection 1(a)(i).

This became part of U.S. law when Congress explicitly adopted the IRO definition of the terms "displaced person" and "refugee" in the Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009, § 2(b) (1948). The Act included, for the first time, a "fear of persecution" standard for refugees. *Id.* at § 7. This standard was interpreted by the courts as requiring "some reasonable basis to fear persecution." *Lavdas v. Holland*, 235 F.2d 955 (3d Cir. 1956); *Accord, United States ex rel Fong Foo v. Shaughnessy*, 234 F.2d 715, 718 n.2 (2d Cir. 1955).

After the Displaced Persons Act expired, Congress enacted the Refugee Relief Act of 1953, Pub.L. No. 203, 67 Stat. 400 (1953), which retained the "fear of persecution" standard. *Id.* at § 2. This standard was construed liberally by the courts and "in sharp contrast" to the stringent withholding of deportation provision. *See Cheng Fu Sheng v. Barber*, 269 F.2d 497, 499-500 (9th Cir. 1959). The "Refugee-Escapee Act" enacted in 1957 again retained the "fear of persecution" standard. Pub.L. No. 85-316, § 15(c)(1), 71 Stat. 643 (1957).

<sup>16</sup>Even today, the INS continues to recognize that "[t]he term refugee also applies to any person who has been considered a refugee under . . . the Constitution of the International Refugee Organization." *See*, Instructions to the INS "Application For Issuance or Extension of Refugee Travel Document" (Form I-570).



In response to the 1956 Hungarian crisis, Congress enacted the "Fair Share Act", which expanded the use of the parole power, § 212(d)(5), 8 U.S.C. § 1182(d)(5), in order to accommodate large influxes of refugees on an emergency basis. Pub.L. No. 86-648, 74 Stat. 504 (1960). One of the eligibility criteria for this Act was that the refugee had to be "within the mandate of the United Nations High Commissioner for Refugees (hereinafter "UNHCR"). *Id.* at § 1. Thus Congress explicitly adopted the liberal UNHCR standard for refugees in this law.

In 1965, Congress enacted § 203(a)(7) of the Immigration and Nationality Act, again incorporating a liberal "fear of persecution" standard into the definition of "refugee". See amendments to the Immigration and Nationality Act, Pub.L. No. 89-236, § 3, 79 Stat. 911 (1965).

The Board of Immigration Appeals repeatedly held that § 203(a)(7) required the alien to prove a "good reason" to fear persecution, a more lenient standard than the standard for withholding under § 243(h). See *Matter of Janus and Janek*, 12 I.&N. Dec. 866, 876 (BIA 1968); *Matter of Tan*, 12 I.&N. Dec. 564, 569-570 (BIA 1967). Accord, *Matter of Ugricic*, 14 I.&N. Dec. 384, 385-386 (Dist. Dir. 1972); *Matter of Adamska*, 12 I.&N. Dec. 201, 202 (Reg. Comm'r 1967).

In contrast, the history behind § 243(h) is one of strict burdens, at one point requiring a showing of actual physical persecution. See, e.g., *Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir. 1961); see, generally, *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969). Moreover, the clear probability standard, applicable to § 243(h) for many years, was unchanged by the Refugee Act of 1980. *INS v. Stevic*, 467 U.S. 407, 430 (1984).

However, when Congress repealed § 203(a)(7) in 1980 and replaced it with § 207 (overseas refugee admissions)

and § 208 (asylum applicants), Congress explicitly retained a liberal "fear of persecution" standard in the definition of refugee. Section 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982). See H.R. Rep. No. 608, 96th Cong., 1st Sess. 3 (1979) ("This was the origin of the definition of 'refugee' which exists under current law in section 203(a)(7) of the Immigration and Nationality Act").<sup>17</sup> This definition is merely the great grandchild of the original IRO definition which required "reasonable grounds" of persecution. This evolutionary analysis is confirmed by the legislative history of the U.N. Convention. According to the drafters of that document:

The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or *can show good reason why he fears persecution*. (emphasis added)<sup>18</sup>

Thus, given the separate history of § 208, its humanitarian origins, and the legislative history of the Refugee Act of 1980, it is clear that the well-founded fear standard for refugee admissions is more generous than the clear probability standard for § 243(h) withholding of deportation.

<sup>17</sup>Thus, "the substantive standard remains unchanged". S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979). Asylum will continue to be granted only to those who meet the "good reason" to fear persecution standard which governed § 203(a)(7). See INS Operations Instruction 208.4 (November 11, 1981), which provides:

The burden is on the asylum applicant to establish . . . a well-founded fear of persecution. . . . This means that the applicant must have actually been persecuted or can show *good reason why he/she fears persecution*. (emphasis added.)

(Reprinted in 4 Gordon & Rosenfeld, *Immigration Law and Procedure* (1986) at 23-156.14.

<sup>18</sup>United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* at 39 (Feb. 17, 1950) (E/1618; E/AC 32/5). See also, U.N. *Handbook* at ¶ 45.

## III.

**THE NINTH CIRCUIT'S CONSTRUCTION OF THE WELL-FOUNDED FEAR STANDARD CONFORMS TO THE UNITED NATIONS DEFINITION OF REFUGEE, IS WORKABLE, AND DOES NOT BURDEN THE AGENCY.**

**A. The Petitioner's Position Finds No Support From The Analysis Of The Statutory Text Conducted By This Court In *INS. v. Stevic*.**

Despite differences in purpose, statutory language, and legislative history, the Petitioner argues that there is an identical legal standard for claims under § 208 and § 243(h), claiming that both require a "more likely than not" or "clear probability" type of analysis.<sup>19</sup> The Petitioner's position finds no support from this Court's decision in *INS v. Stevic*, 467 U.S. 407 (1984).

The Court's analysis in *Stevic*, which carefully distinguished between requests for asylum under § 208 and requests for withholding of deportation under § 243(h), is instructive in this case. *Stevic* argued that he was eligible for withholding of deportation upon establishing a well-founded fear of persecution. The Court disagreed, first observing that in order to be eligible for § 208 (asylum), an alien in the United States must meet the definition of refugee contained in § 101(a)(42)(A) of the Act. The Court further pointed out that § 243(h) does not refer to § 101(a)(42)(A), does not use the term "well-founded fear," nor refer to "refugees" or "asylees".

<sup>19</sup>Petitioner relies heavily in its brief on the Board's decision in *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985). In *Acosta*, the Board erroneously concludes that the two standards are "not meaningfully different", *id.* at 25, by completely ignoring the different purpose and history of § 208 and § 243(h). This fundamental assumption which underlies its decision undercuts the Board's reasoning and holding. Through its blurring of the two standards in order to maintain its preferred "clear probability" approach to asylum claims, the Board has frustrated Congress' clear desire to conform U.S. law with the more generous United Nations definition of the term "refugee."

For the purpose of its analysis in *Stevic*, the Court assumed that the "well-founded fear" standard is "more generous" than the "clear probability" standard. *Stevic*, 467 U.S. at 425. In several passages the Court implied that the "well-founded fear" standard is different and less rigorous than the "clear probability" standard:

[I]t seems clear that Congress understood that refugee status alone did not require withholding of deportation, but rather, the alien had to satisfy the standard under § 243(h) . . . The Court of Appeals' decision rests on the mistaken premise that every alien who qualifies as a "refugee" under the statutory definition is also entitled to a withholding of deportation under § 243(h). *Id.* at 428.

The Court of Appeals granted respondent relief based on its understanding of a standard which, even if properly understood, does not entitle an alien to withholding of deportation under Section 243(h). *Id.* at 430.

It is apparent from these statements that even if an alien qualifies as a refugee, that is not enough to prove a § 243(h) claim. In other words, demonstrating a well-founded fear of persecution does not necessarily establish a clear probability of persecution, but by definition, is sufficient to qualify for § 208 asylum.

**B. The More Moderate Position On Well-Founded Fear Recognized By This Court In *Stevic* And Applied By The Ninth Circuit Is Consistent With The United Nations Definition.**

Since the *Stevic* decision, several circuit courts have decided that this Court's assumption in *Stevic*, that the well-founded fear standard is "more generous" than the clear probability standard, was a correct one. *See Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282-1283 (9th Cir. 1984); *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984); *Carvajal-Munoz v. INS*, 743 F.2d 562, 573-575 (7th



Cir. 1984). *Contra, Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984).

Although this Court has not yet defined the meaning of the well-founded fear standard, this Court observed in *Stevic* that:

A more moderate position is that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility. 467 U.S. at 424-425.

This position is the fair, realistic, and humanitarian standard for asylum applicants that was originally envisioned by Congress in the Refugee Act of 1980. The Ninth Circuit Court of Appeals has expressly adopted this interpretation of "well-founded fear," requiring a showing of a "reasonable possibility" of persecution. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984). The Seventh Circuit has done the same. See *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).

The well-founded fear standard is not a new legal standard.<sup>20</sup> It originally appeared in Article 1 of the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) and has been interpreted by various foreign governments who are signatories to either the 1951 U.N. Convention or 1967 Protocol Relating to the Status of Refugees. See brief of amicus curiae, The Lawyers Committee for Human Rights.

The factors recognized by the United Nations as relevant to what constitutes a "well-founded fear of persecution" are particularly significant here because Congress specifically passed the Refugee Act of 1980 with the intent

<sup>20</sup>For the history of the well-founded fear standard, see briefs of amici curiae, United Nations High Commissioner for Refugees, and The International Human Rights Law Group and Washington Lawyers Committee for Civil Rights Under the Law.

of bringing United States statutory provisions concerning refugees into conformity with the provisions of the United Nations Protocol. See J. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 781, 96th Cong., 2d Sess. 19, 20 (1980).

Thus, in recognition of Congress' express desire to adopt the U.N. Convention's definition of "refugee," the Court of Appeals has appropriately looked to the U.N. interpretation of the key elements of the definition. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985).

A standard which requires credible evidence of a *reasonable* fear of persecution such as that adopted by the Ninth and Seventh Circuits, is consistent with the interpretation by the United Nations High Commissioner For Refugees (UNHCR) in the U.N. *Handbook*.<sup>21</sup> As explained in the *Handbook*, "well-founded fear" is not a purely objective standard that relies on balancing probabilities. Rather, it requires a combined analysis of the subjective fear and the objective reasonableness of the fear:

<sup>21</sup>The UNHCR is charged with the responsibility of supervising the application of the provisions of the U.N. Convention and Protocol Relating to the Status of Refugees. See Article 35 of the 1951 U.N. Convention and Article II of the 1967 U.N. Protocol.

The UNHCR has published the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979). Each country may decide whether a particular applicant has sustained his or her burden. But this fact has no bearing on the substantive nature of the burden itself. The *Handbook* has been accepted by both the BIA and the courts as a significant source of guidance as to the meaning of the Protocol. *Matter of Rodriguez-Palma*, 17 I.&N. Dec. 465, 468 (BIA 1980); *Matter of Frentescu*, 18 I.&N. Dec. 244, 246 (BIA 1982); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 514, n. 3 (9th Cir. 1985); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).



37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. . . . Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin.

38. To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded." This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. *The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.* (emphasis added).

43. These considerations *need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded . . . .* The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the *possibility* of persecution may be greater than in the case of a person in obscurity. (emphasis added).<sup>22</sup>

The Protocol's burden of proof, therefore, emphasizes the fear of the applicant and is satisfied if the applicant is able to prove by credible evidence that his or her fear of persecution is reasonable. The UNHCR indicates that the proper focus of an asylum examiner's inquiry should be on the reasonableness of the fear, not on a weighing of

<sup>22</sup>U.N. Handbook, ¶¶ 37, 38 and 43. See also, U.N. Handbook, ¶¶ 39-42; and generally Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 66-67 (1981).

probabilities.<sup>23</sup> Since decisions on asylum have the potential for determining the life or death of a person, an asylum decision cannot be made to depend on the odds of persecution, especially in light of the difficulty a refugee has in producing tangible proof of future persecution. See U.N. Handbook at ¶¶ 196, 197. See also brief of amicus curiae, The Lawyers Committee for Human Rights.

Thus, proving a well-founded fear of persecution requires that an applicant demonstrate a reasonable basis to fear persecution. The reasonableness of the fear is evaluated by considering a totality of the circumstances, including a subjective and objective component. The subjective component is satisfied if the fear is genuine. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986). The objective component is satisfied if persecution is, in fact, a "reasonable possibility." In determining whether persecution is a reasonable possibility, the alien's experience prior to coming to this country, the conditions in the alien's country of origin, its laws, and the experience of others are relevant. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

The well-founded fear standard cannot be reduced to an analysis based on predicting certainties or forecasting probabilities. It is often the case that bona fide asylum applicants lack concrete evidence of their claims. A "more likely than not" or a preponderance of the evidence standard may be proper in an ordinary civil suit where

<sup>23</sup>One leading scholar has stated that a "balance of probability" test is inappropriate for determining refugee status and recommends a "lesser degree of likelihood" such as a "reasonable chance" or a "serious possibility" test. G. Goodwin-Gill, *The Refugee in International Law* (1983), pp. 22-24. The UNHCR has also criticized the clear probability standard as "rather strict". Resp. App. at 1, 3.

both parties are presumed to have equal access to evidence in support of their case. But here, where people may face torture, imprisonment, or death, requiring such persons to prove that it is "more likely than not" that a future event will occur (namely their own persecution at the hands of a far away government) is a burden that most asylum applicants simply cannot hope to satisfy regardless of the true merits of their claims.<sup>24</sup>

The extreme difficulties most refugees would face in meeting the clear probability standard is candidly admitted in an internal study of asylum applications made by the INS itself:<sup>25</sup>

"We can't make a decision solely from the evidence presented because most people can't meet the strict standards. . . I never ask a person anything. I just look and see if the person belongs to a nationality group that everyone agrees are refugees like the Poles." INS examiner, *INS Asylum Study* at 53.

Admittedly, the "clear probability" standard is extremely difficult to meet. "If we used that all the time," said a district director, "no one would be given asylum." *INS Asylum Study* at 54.

The clear probability test not only fails to accurately reflect the U.N. definition of refugee due to its stringent

<sup>24</sup>In light of the tremendous importance of the issues at stake in asylum cases, "the social cost of even occasional error is substantial." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). An evaluation of this societal cost provides independent support for the proposition that the standard of proof for asylum should not require a showing of clear probability of persecution. See briefs of amici curiae, American Civil Liberties Union, and American Immigration Lawyers Association.

<sup>25</sup>"Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service" INS, Wash., D.C., June & December, 1982 (hereinafter "INS Asylum Study"). See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 252-254 (1983-1984). Excerpts of this 93-page report have been introduced into the Congressional Record by Senator Edward Kennedy and have appeared in the press. See 129 Cong. Rec. S6035 (daily ed. May 4, 1983) and *The Boston Globe*, p. 2, May 9, 1983.

proof requirements, it also totally ignores the subjective component of the analysis emphasized in the U.N. *Handbook*.

Respondent is *not* arguing that subjective fear alone is enough to establish a well-founded fear of persecution. A fear which is "well-founded" is not a purely irrational or speculative fear. It is a genuine fear rooted in an objective reality. In order to establish that he or she has good reason to fear persecution, an alien must present *specific facts* which set forth the objective basis for the fear. *Lopez v. INS*, 775 F.2d 1015, 1016 (9th Cir. 1985); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-628 (1st Cir. 1985). Mere assertions of possible fear do not establish a well-founded fear of persecution. *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985); *Chatila v. INS*, 770 F.2d 786 (9th Cir. 1985); *Sagermark v. INS*, 767 F.2d 645, 649 (9th Cir. 1985); *Espinoza-Martinez v. INS*, 754 F.2d 1536 (9th Cir. 1985); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984); *Shoae v. INS*, 704 F.2d 1079 (9th Cir. 1983).

Even proof of a sincere and strongly felt fear is not itself sufficient to establish an alien's eligibility for political asylum unless the fear is both subjectively genuine and objectively reasonable. *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1394 (9th Cir. 1985). Furthermore, an applicant's testimony must be *credible* in order to establish his or her claim. *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986); *Canjura-Flores v. INS*, 784 F.2d 885, 888-889 (9th Cir. 1985); *Saballo-Cortez v. INS*, 761 F.2d 1259 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985). Finally, generalized fears of persecution based on political upheaval, civil strife, and widespread violence affecting the general population do not constitute a well-founded



fear of persecution. *Kaveh-Haghig v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986); *Martinez-Romero v. INS*, 692 F.2d 595, 595-596 (9th Cir. 1982).

In the decision below, the Court of Appeals discussed the type of evidence required to establish that a fear is "well-founded". The applicant must present *specific* facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear persecution. Ordinarily, some objective evidence supporting the applicant's contentions must be presented. However, the court recognized that sometimes an applicant's own testimony will be all that is available. Where it is credible, persuasive, and specific, testimony alone may suffice.<sup>26</sup> This

<sup>26</sup>In formulating this approach, the Ninth Circuit referred to *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984). In dicta, the *Carvajal* court added a "singl[ing] out for persecution" requirement to its interpretation of the well-founded fear standard. *Id.* at 574. Respondent is troubled by this phrase because it further confuses this issue. For example, the Sixth Circuit has ascribed a particularly strict and unrealistic meaning to this phrase. See *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984) and *Nasser v. INS*, 744 F.2d 542 (6th Cir. 1984). Asylum applicants cannot be expected to produce an affidavit from their persecutor. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (recognizing inherent difficulties refugees have in producing independent corroborative evidence of their claims); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565 (9th Cir. 1984) (striking down BIA requirement of proof of a continuous and contemporaneous cognizance of the respondent and her past activities).

The Petitioner relies on *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), cert. den., 390 U.S. 1003 (1968), for the proposition that an asylum applicant must prove that he "would be singled out for persecution." Pet. Brief at 24. This would place an impermissibly strenuous gloss on proving a well-founded fear of persecution. Actually, *Cheng Kai Fu* does not even use this terminology nor stand for this proposition. All it holds is that an asylum applicant's fear must be particularized as to him in the sense that his fear must be more specific than any generalized fears of the population at large.

Respondent does not argue with the need for some sort of "particularity" requirement. Respondent agrees that "there must

(Continued on following page)

approach is correct because it reflects the U.N. interpretation of the well-founded fear standard which Congress expressly intended to incorporate into U.S. law.

### C. The Well-Founded Fear Standard Adopted By The Court Of Appeals Is Neither Amorphous Nor Vague.

The Petitioner asserts that the Court of Appeals "has done little to give substance" to the legal standard in asylum cases and maligns the court for "mandating such an ill-defined standard." Pet. Brief at 29.

Petitioner's assertions are misguided. It has only been since this Court's 1984 decision in *Stevic* that Courts have begun to develop the parameters of the well-founded fear standard. This is, therefore, a situation where other

(Continued from previous page)

be some evidence that the applicant or those similarly situated are at a greater risk than the general population." *Del Valle v. INS*, 776 F.2d 1407, 1411 (9th Cir. 1985). Accord, *Vides-Vides v. INS*, 783 F.2d 1463, 1465-1467 (9th Cir. 1986); *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985). The "singled out" language is neither necessary nor helpful to the formulation of the well-founded fear standard because it has a great potential for abuse. Immigration officers frequently have interpreted this phrase to require concrete proof that the persecutor is aware of the applicant and will be out looking for him or her. Such a heavy evidentiary burden totally fails to come to grips with the realities present in proving asylum claims. See U.N. *Handbook* at ¶¶ 196-197. Both the UNHCR and the Canadian government have specifically rejected this "singling out" requirement. See UNHCR letter dated January, 1982 (Resp. App. at 3) and Cox, "Well-Founded Fear of Being Persecuted": *The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. of Int'l. Law 333, 365 (1984). It has also been strongly criticized by legal commentators. See Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 San Diego L.Rev. 327, 370-373 (1986). A person who has not yet attracted the attention of his government need not wait until detection and persecution before he can claim refugee status. All the U.N. definition requires is proof that individuals similarly situated have been persecuted in the past. See U.N. *Handbook* at ¶ 43.



"factors remain[ ] to be developed by the gradual process of judicial inclusion and exclusion." *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963). The Petitioner ignores the evolving case law in the Ninth Circuit, discussed above, which has defined, developed, and provided examples of the well-founded fear standard. Furthermore, it was not the Court of Appeals which "mandated" the well-founded fear standard for asylum cases; it was Congress that incorporated this United Nations definition of refugee into our laws.

Contrary to the Petitioner's view, the well-founded fear standard is not "amorphous" or "vague". (Pet. Brief at 31). All legal standards can be said to be amorphous or vague unless defined and enriched by judicial interpretation.<sup>27</sup> The well-founded fear standard has been defined and enriched by the U.N. *Handbook* and judicial precedent. As a legal standard it is as "workable" as the "clear probability" standard, "preponderance of the evidence" standard, "clear, convincing, and unequivocal" standard, "beyond a reasonable doubt" standard, or any other legal standard.

**D. Contrary To The Government's Suggestion, The Application Of A More Generous Standard For Asylum Is, And Has Been Workable And Not Unduly Burdensome.**

In attacking the application of a more generous standard for asylum than for withholding of deportation, the Petitioner maintains that the use of a lower eligibility

<sup>27</sup>Petitioner's attack on the linguistic precision of the standard ignores the difference in meaning and spirit Congress plainly intended to codify. "[E]ven if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a standard of proof is more than an empty semantic exercise . . . [because] the 'standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington v. Texas*, 441 U.S. 417, 425 (1979), quoting from *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part).

standard would be administratively unworkable. Pet. Brief at 28-32. The Ninth Circuit approach, in fact, appears to be working smoothly at both the administrative and judicial levels.<sup>28</sup>

Contrary to the Petitioner's suggestion, it is not difficult for a decisionmaker to apply two different standards of proof to the same set of facts or body of evidence. For example, in the San Francisco District of the Immigration Court alone, subsequent to the Ninth Circuit's application of a more generous standard for asylum, immigration judges have had little trouble denying withholding of deportation because a clear probability was not established, but granting asylum because a well-founded fear of persecution was demonstrated.<sup>29</sup> The Board itself has applied the two-tiered standard for asylum subsequent to the Ninth Circuit's decision in this case without procedural or sub-

<sup>28</sup>The Petitioner maintains that the Ninth Circuit approach would "unnecessarily require [expensive] dual adjudication of each alien's persecution claim," and is thereby unworkable. Pet. Brief at 31. This argument raises an issue that is not actually before the Court and distracts attention from the true issues in this case involving statutory language, legislative history, and the meaning of "well-founded fear." To focus on this issue, the Petitioner attacks a suggestion by the Seventh Circuit in *Carvajal-Munoz v. INS*, 743 F.2d 562, 570 (7th Cir. 1984), that asylum and withholding of deportation requests be considered in two entirely separate hearings. However, at no point has the Ninth Circuit, in this case or in any other case, made such a suggestion or adopted such a requirement.

<sup>29</sup>See, e.g. *Matter of Gilberto Villena-Magana*, A27 196 330-SFR (June 4, 1986); *Matter of Fernan Ortiz de Zarate*, A21 318 113-SFR (May 9, 1986); *Matter of Josepha Saenz de Cerda*, A22 810 236-SFR (May 7, 1986); *Matter of Leonidas Antonio Grimaldi*, A24 273 455-SFR (May 1, 1986); *Matter of Jose Raul Nolasco-Tejada*, A23 690 904-SFR (April 28, 1986); *Matter of Ronan Martell Lozano*, A26 360 810-SFR (March 13, 1986); *Matter of Graciela Funes-Melgar*, A24 266 006-SFR (February 12, 1986); *Matter of Jose Marco Tulio Nunez*, A24 343 657-SFR (February 11, 1986); *Matter of Joaquin Vanegas-Britos*, A23 002 429-SFR (November 14, 1985); *Matter of Ofilio Torres Hernandez*, A24 279 649-SFR (August 29, 1985).

stantive difficulties. See *Matter of Escobar and Sanchez*, Int. Dec. No. 2996 (BIA 1985).

In reviewing Board decisions involving denials of both withholding and asylum, the Ninth Circuit also does not appear to have any difficulty in applying two different standards to the same set of facts. In *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985), a decision which scarcely takes up five pages in the Federal Reporter (including headnotes), the Court of Appeals thoroughly reviewed the evidence of persecution and agreed that a clear probability had not been established, but found that a well-founded fear existed in the evidence presented.

Furthermore, the Ninth Circuit's adoption of the more generous standard for asylum certainly has not resulted in a wholesale reversal of Board decisions denying asylum. See *Quintanilla-Ticas v. INS*, 783 F.2d 955 (9th Cir. 1986) (no well-founded fear of persecution where the alien, a former uniformed member of the military band, had resigned from the military and would no longer wear his uniform); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (no prima facie showing of well-founded fear where Iranian applicant only alleged sympathy for and casual affiliation with an organization opposed to Khomeini). Accord, *Contreras-Aragon v. INS*, 789 F.2d 777 (9th Cir. 1986); *Vides-Vides v. INS*, 783 F.2d 1463 (9th Cir. 1986); *Kaveh-Haghigy v. INS*, 783 F.2d 1321 (9th Cir. 1986); *Diaz-Escobar v. INS*, 782 F.2d 1488 (9th Cir. 1986). See also *Yousefinia v. INS*, 784 F.2d 1254 (5th Cir. 1986); *Bahramnia v. INS*, 782 F.2d 1243 (5th Cir. 1986).

Nor does the Ninth Circuit's approach require that the court review every case under both standards:

If the BIA is correct that Diaz-Escobar failed to demonstrate a well-founded fear of persecution, we need to proceed no further because *a fortiori*, Diaz-

Escobar would have failed to meet the more stringent standard of clear probability of persecution. *Diaz-Escobar*, 782 F.2d at 1492.

Thus, in every case where the well-founded fear standard is not established, the higher standard of clear probability, by definition, could not be met.

The Ninth Circuit's interpretation of the well-founded fear standard is, however, more "workable" than the vague and unhelpful language championed by the Board and Petitioner. In *Matter of Acosta*, Int. Dec. No. 2986, at 25 (BIA 1985), the Board states that its inquiry in persecution cases is "qualitative" rather than "quantitative." This standard for asylum cases is no standard at all. By hiding behind a specter of "qualitative" evidence, asylum determinations are relegated to a form of "seat of the pants" justice that has no place in the life and death arena of possible persecution. For this Court to place its imprimatur on the ill-defined position of the Board and the Petitioner as a legitimate standard of proof would render the asylum area of law a virtual guessing game of what will or will not strike the right chord with the Board. Such an approach is contrary to the intent of Congress, the statutory framework of the law, and the fundamental character of asylum.

#### IV.

**THIS COURT SHOULD NOT DEFER TO THE BOARD'S INTERPRETATION OF THE WELL-FOUNDED FEAR STANDARD BECAUSE IT IS CONTRARY TO CONGRESSIONAL INTENT AND HAS NOT BEEN CONSISTENTLY APPLIED.**

##### **A. Requiring A Clear Probability Of Persecution For Asylum Would Frustrate The Intent Of Congress.**

Petitioner argues that the Board's interpretation of the standard of proof for asylum is entitled to substantial deference from this Court (Pet. Brief at 9). However, the



Board's position that applicants for asylum under § 208 must prove a clear probability of persecution, *see Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985), does not merit deference because it ignores the clear intent of Congress to require a different standard of proof for § 208 requests for asylum.

The issue in this case is entirely one of statutory construction: whether the meaning of the term "well-founded fear of persecution" used by Congress in the definition of refugee found in § 101(a)(42)(A) of the Act is distinct from the "clear probability of persecution" standard created by the Board and the Courts for proving entitlement to withholding of deportation under § 243(h). Deference to the Board is not proper here because the courts are the final authority on issues of pure statutory construction. *F.T.C. v. Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965). Even where an agency has made clear its own interpretation of a statutory term, "the Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber v. Allen*, 396 U.S. 168, 193 (1969).

The interpretation of a statutory standard is a pure question of law which the Court must review *de novo*. *See Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971). *See also* 5 U.S.C. § 706 (1980). Moreover, the Court may only defer to the administrative construction of a statute to the extent that it is consistent with congressional intent. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 & n. 9. (1984). As argued more fully above, the Board's interpretation of the well-founded fear language frustrates the express will of Congress "to respond to the urgent needs of per-

sons subject to persecution in their homelands." S. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980).

Deference to the agency's interpretation of "well-founded fear" would also frustrate the intent of Congress to circumscribe the discretion exercised by the Executive branch in refugee policy. A recurrent theme in the legislative history of the Refugee Act of 1980 was the concern of Congress about the Executive's use of politically motivated selection criteria stemming from the unfettered discretion over refugee admissions vested in the Executive branch. *See* H.R. Rep. No. 608, 96th Cong., 1st Sess. 11 (1979). *See also* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 34, 36, 47-48, 56, 88-89 (1981).

In an effort to limit that discretion, Congress severely restricted the power of the Executive to admit refugees under the "parole" provisions of the Act, *see* 8 U.S.C. § 1182(d)(5)(B), and incorporated the nondiscriminatory and politically neutral definition of "refugee" from the U.N. Protocol. The House Committee stated its intent "to monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17-18 (1979).<sup>30</sup>

<sup>30</sup>The concern of Congress over the potential for the executive branch to undermine refugee legislation through a stringent application was expressed by Congresswoman Holtzman in reference to the proposed Refugee Act of 1977, which was the genesis of the 1980 Act:

[W]hen Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because although I think the definition [of refugee] in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution we don't specify how that well-founded fear is to be ascertained. . . . *Policy and Procedures for the Ad-*

(Continued on following page)



In practice, the Board's interpretation of the standard of proof has permitted the re-introduction of political bias into the process through manipulation of the standard.<sup>31</sup> The unreasonably high standard of proof for asylum imposed by the Board and endorsed by Petitioner has not carried out Congress' primary goal of creating fair procedures to govern the admission of refugees, *see*, S. Rep. No. 96-256 at 9, and thus is not entitled to deference.

The Refugee Act does not delegate to the Attorney General the duty to develop substantive standards for asylum. To the contrary, Congress specified the precise standard to be applied to asylum claims: the applicant must show a "well-founded fear of persecution". *See* § 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). The authority

(Continued from previous page)

*mission of Refugees into the United States: Hearings on H.R. 3056 Before the House Subcom. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary, 95th Cong., 1st Sess. 127 (1977).*

<sup>31</sup>An internal study of the actual practice of the Immigration and Naturalization Service in asylum adjudications found: In some cases different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while other do not.

For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have "a classic textbook case." On the other hand, BHRHA [Bureau of Human Rights and Humanitarian Affairs of the U.S. State Department] sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. . . .

Although the Refugee Act abolished the country of national origin test for refugee/asylee status, for foreign policy or other reasons the criterion may still be overriding. It is unclear, however, what the statutory basis for such a determination is.

"Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service," INS, Washington, D.C., June and December 1982, p. 59. *See also* Heiton, *Political Asylum Under the Refugee Act of 1980: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 250-254 (1983-1984).

delegated to the Attorney General under § 208 of the Act was specifically limited to the establishment of *procedures* for applying for asylum. *See* 8 U.S.C. § 1158(a). Had Congress intended to delegate to the Attorney General the authority to create a statutory asylum standard, Congress would not have specified the well-founded fear of persecution standard. Further, the authority of Congress to prescribe standards of proof in administrative proceedings is within its "traditional powers." *Steadman v. SEC*, 450 U.S. 91, 96 n. 10 (1981), quoting *Vance v. Terrazas*, 444 U.S. 252, 265 (1980).

The interpretation of the standard of proof for asylum specified under the Refugee Act must therefore be distinguished from those cases in which Congress intended to delegate to the agency the task of developing a meaning for a statutory term.<sup>32</sup> For example, in *INS v. Wang*, 450 U.S. 139, 145 (1981), this Court deferred to the Board's conclusion that the aliens had not met the discretionary standard for suspension of deportation. That decision, however, was based upon Congress' broad delegation to the agency of authority over that form of relief.<sup>33</sup> But, unlike the "extreme hardship" determination at issue in

<sup>32</sup>*See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. —, 88 L.Ed.2d 419, 430-31 (1985) (Court upholds agency's inclusion of adjacent wetlands within "waters" subject to the Clean Water Act citing Congress' broad definition of "waters" and the "inherent difficulties" in its precise definition); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984) (finding that Congress had made an express delegation of authority to the agency when it "left a gap" in the statute).

<sup>33</sup>The Court concluded that the Immigration and Nationality Act delegated to the Attorney General the duty to construe the "extreme hardship" requirement at issue in that case, that the Attorney General's narrow construction of that requirement was consistent with the limiting language used in that statute, and that the statute granted additional discretion because the case arose on a "motion to reopen". *Wang*, 450 U.S. 139 (1981).

*Wang*, whether an alien has met the definition of "refugee" (i.e., whether he or she has shown a well-founded fear of persecution) is a nondiscretionary determination. Although the Attorney General has discretion to grant or deny applications for asylum under § 208, the exercise of discretion is independent of whether the alien meets the definition of refugee. See *INS v. Stevic*, 467 U.S. 407, 423 n. 18 (1984).

Moreover, instead of leaving the well-founded fear determination to the discretion of the Attorney General, Congress specifically "intended that the language be construed consistently with the Protocol." S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980). Congress, therefore, did not delegate the definition of refugee to the Attorney General, but rather provided a distinct and judicially enforceable standard.<sup>34</sup> Because the issue here may only be resolved through statutory construction with reference to the legislative history of the Refugee Act and the United Nations Protocol on the Status of Refugees, the issue is squarely within the Court's competence.

**B. The Board's Interpretation Of Well-Founded Fear Is Not Longstanding Nor Has It Been Consistently Applied.**

Petitioner further argues that this Court should defer to the Board's interpretation of the well-founded fear standard on the ground that it is a longstanding and con-

<sup>34</sup>The Petitioner accuses the Ninth Circuit of ignoring the Board's "years of experience adjudicating persecution claims." when it refuses to adopt the Board's formulation of "well-founded fear". (Pet. Brief at 29). In doing so, the government forgets that it was not until the Refugee Act of 1980 that the Board actually had a chance to review asylum and persecution issues utilizing the well-founded fear standard for refugees of § 101(a)(42)(A) of the Immigration and Nationality Act. On the other hand, the UNHCR, whose *Handbook* has been used by the Court of Appeals, has had some 35 years of experience, and was the authority to which Congress clearly intended deference be given.

sistent interpretation. See Pet. Brief at 9-10. Petitioner asserts that the Board has consistently interpreted the standard of proof required for asylum as equivalent to that required for withholding of deportation since its decision in *Matter of Dunar*, 14 I.&N. Dec. 310 (BIA 1973). The Board's current position stated in *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985), is neither longstanding nor has it been consistently applied.

The Board's decision in *Dunar* discussed only the standard of proof for withholding of deportation under § 243(h), not the standard for asylum under § 208. Prior to the passage of the Refugee Act of 1980, the Immigration and Nationality Act did not provide for the grant of asylum nor did the term "well-founded fear of persecution" appear in the Act. In *Matter of Dunar*, 14 I.&N. Dec. 310 (BIA 1973), the Board held that the accession of the United States to the United Nations Protocol Relating to the Status of Refugees did not alter the clear probability standard of proof applied to claims to withholding of deportation under the then-existing § 243(h). As in *INS v. Stevic*, 467 U.S. 407 (1984), *Dunar* only decided the question of the burden of proof for withholding of deportation under § 243(h). Therefore, neither *Dunar* nor any other case decided prior to the addition of the asylum provision to the Act in 1980 has any bearing on the question of what Congress intended to require as proof of persecution under the new asylum provision.

Petitioner asserts that after the passage of the 1980 Refugee Act, the Board consistently held that the clear probability standard and the well-founded fear standard were identical and applied to requests for both withholding of deportation and asylum. A review of the Board's decisions, however, shows them to be far from consistent. The Board did not authoritatively discuss the issue of



whether the burden of proof for claims under § 208 was distinct from that applied to § 243(h) requests until its recent decision in *Acosta*. Prior to its decision in *Acosta*, the Board had provided no reasoned justification for applying the clear probability of persecution standard of proof to asylum claims.<sup>35</sup>

Between the passage of the Refugee Act and its decision in *Acosta*, the Board vacillated between a number of formulations of the standard. Compare *Matter of Exilus*, 18 I.&N. Dec. 276, 277 (BIA 1982) (alien "must establish that he is likely to be persecuted"); with *Matter of Exame*, 18 I.&N. Dec. 303, 305 n. 4 (BIA 1982) (test for eligibility for asylum is "whether objective evidence of record is significantly probative of the likelihood of persecution . . . sufficient to establish a well-founded fear of persecution"). Accord, *Matter of Sibrun*, 18 I.&N. Dec. 354 (BIA 1983); *Matter of Leon-Orosco & Rodriguez-Colas*, Int. Dec. No. 2974 (BIA 1983, Att'y Gen. 1984) (alien must demonstrate a "realistic likelihood that he will be persecuted").

At times, the Board seemed to acknowledge by its use of the disjunctive that the Refugee Act had added a new and distinct standard of proof for asylum.<sup>36</sup> In *Matter of Martinez-Romero*, 18 I.&N. Dec. 75, 79 (BIA 1981, *aff'd*, *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982)), the Board denied the applicant's claim, ex-

<sup>35</sup>Where the Board did assert that the clear probability standard applied to requests for asylum, it merely cited *Dunar*, which, as discussed above was never controlling on that issue. See, e.g., *Matter of Martinez-Romero*, 18 I.&N. 75, 78 (BIA 1981).

<sup>36</sup>The Ninth Circuit has noted in upholding pre-*Acosta* denials of asylum and withholding of deportation that the Board's decision recognized the existence of two distinct standards. See *Vides-Vides v. INS*, 783 F.2d 1463, 1468 (9th Cir. 1986); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986).

plaining that the evidence offered "does not tend to establish that she would be persecuted or that she has a well-founded fear of persecution". See also, *Matter of Portales*, 18 I.&N. Dec. 239, 241 (BIA 1982) ("alien must demonstrate a clear probability that he will be persecuted . . . or a wellfounded fear of such persecution"). The obvious implication of phrasing the burden of proof in the alternative, as seen in *Martinez-Romero* and *Portales*, is that one is different from the other.

Moreover, the actual practice of the Immigration and Naturalization Service (INS) and the Department of State in this period of time belies the Petitioner's claim that the Board in *Acosta* was merely re-affirming its prior position that the standards were identical. The Immigration and Naturalization Service's own internal study reveals that the INS attorneys responsible for asylum cases believe that the two standards are significantly different:

The "clear probability" standard in my estimation is too high a standard, both in theory and in practice. In theory, it comes too close to "beyond a reasonable doubt." In practice, it means that unless you can present *Time* magazine articles on your own treatment, or State or the CIA has taken you under their wing, you may as well hang it up. *INS Asylum Study* at 53.

. . .

A well-founded fear of persecution seems to me to be a standard that is easier to meet, and more in keeping with the actual level of proof that a person could reasonably be expected to present. *Id.* at 55.

The State Department's "Refugee Processing Guidelines" (April 18, 1981) at p. 4, echo this more generous interpretation of the well-founded fear standard:

The applicant need not establish that persecution occurred in the past or that persecution would actually occur if he returned to his home country. Rather, it



is only necessary that the interviewer conclude that a fear of persecution exists and is well-founded.

This agency's history of inconsistent application of the standard is not the type of settled position to which the courts defer. The doctrine of judicial deference to administrative decisions clearly does not apply to this case. The issue here is one of statutory construction, over which the courts have been given authority. *F.T.C. v. Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965). Because the Board's construction of the well-founded fear standard violates both the clear language and intent of the Refugee Act, the courts may not defer to that construction. See *N.L.R.B. v. Brown*, 380 U.S. 278, 291-292 (1965). Independent judicial review is required.

## V.

### **IT WOULD NOT BE ANOMALOUS TO MAKE ASYLUM AVAILABLE ON A LESSER SHOWING OF PERSECUTION THAN IS REQUIRED FOR WITHHOLDING OF DEPORTATION, NOR RENDER WITHHOLDING SUPERFLUOUS.**

#### **A. An Analysis Of The Statutory Structure Of The Asylum And Withholding Statutes Reveals That The Ninth Circuit's Interpretation Does Not Result In An Anomaly.**

The Petitioner argues that by providing a more generous burden of proof for asylum, § 243(h) would be rendered "virtually superfluous" and that the result would be anomalous. The Petitioner would therefore apply the same standard of proof for asylum as it would for withholding.

The structure of the Immigration and Nationality Act into which § 208 asylum and § 243(h) fit is consistent with the statutory construction of the court below. Section 243(h) historically has been, and continues to be, exclusively a remedy that is available in expulsion proceedings.

On the other hand, asylum under § 208 is not exclusively a remedy, relief, or defense to deportation. Asylum is a benefit which is sought and often granted outside of the immigration court context, and which can be renewed before the court. 8 C.F.R. § 208.1 *et seq.* Renewability of asylum claims in deportation proceedings became possible only shortly before the passage of the Refugee Act of 1980. *Matter of Lam*, 18 I.&N. Dec. 15, 18, n. 4 (BIA 1981) ("we are only just now beginning to resolve some of the problems caused by this addition to our jurisdiction, including the problem of determining exactly how withholding of deportation and asylum are to fit together").

This renewability of application procedure is not unique to asylum. For example, where an application for lawful permanent resident status under § 245, 8 U.S.C. § 1255 (1982), has been denied by the district director, the application can be renewed in immigration court proceedings pursuant to 8 C.F.R. § 245.2(a). In contrast to § 208 (asylum) and § 245 (permanent resident status), § 243(h) (withholding) is exclusively a deportation relief that cannot initially be sought before the district director. Withholding is like any other deportation relief that is only available from the immigration court.<sup>37</sup>

Therefore, while it arguably might be anomalous to have two similar forms of relief in one deportation proceeding, the anomaly vanishes when understood in the context that § 208 (asylum) is an affirmative request for a benefit, while § 243(h) (withholding) is a deportation defense.

<sup>37</sup>Other deportation remedies that are available exclusively in the immigration court context include suspension of deportation under § 244(a), 8 U.S.C. § 1254(a); waiver of exclusion and deportation under § 212(c), 8 U.S.C. 1182(c), see *Matter of Silva*, 16 I.&N. Dec. No. 26 (BIA 1976); and fraud waiver under § 241(f), 8 U.S.C. 1251(f). These waivers and reliefs are available only when hardship or rehabilitation are demonstrated.

In fact, it is the Petitioner's position that would be anomalous. Under its construction, Congress provided two identical statutory remedies dealing with persecution with the same burdens of proof, but used different language. Respondent submits that Congress would not have been so redundant. If Congress had intended such a result, it would have used identical language. Congress specified two separate statutory provisions that generically deal with persecution, each with a distinct history traced by this Court in *Stevic*.

Thus, an analysis of the statutory structure of the asylum and withholding statutes demonstrates that the Ninth Circuit's interpretation does not result in an anomaly. See *Cardoza-Fonseca*, 767 F.2d 1448, 1451-52 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984); *Carvajal-Munoz*, 743 F.2d 562, 575 (7th Cir., 1984).

**B. The Element Of Discretion In Asylum Forecloses Any Suggestion That The Withholding Provision Has Been Rendered Superfluous.**

The Petitioner also challenges the Court of Appeals' construction on the grounds that it would be incongruous to permit the "greater relief" of asylum to be granted on a lesser showing than that required for withholding of deportation. The Petitioner's contention is misleading and ignores several important factors in the scheme of the Immigration and Nationality Act.

Most significantly, § 243(h) withholding is mandatory while § 208 asylum is discretionary.<sup>38</sup> Therefore, the Ninth

<sup>38</sup>This Court has already recognized the significance of discretion as a distinguishing point. "The Congress distinguished between *discretionary grants of refugee admission or asylum* and the entitlement to a withholding of deportation if the § 243(h) standard was met." *Stevic*, 467 U.S. at 426. (emphasis added.)

(Continued on following page)

Circuit's holding (and the Supreme Court's assumption in *Stevic*) that the well-founded fear standard for asylum is more generous than the § 243(h) standard makes every bit of sense. Under this formulation of the standard, even though an alien has established a well-founded fear of persecution, the decisionmaker might appropriately deny asylum relief as a matter of discretion, for example, because of criminality on the part of the applicant, or use fraudulent documents to gain entry into the United States. See, e.g., *Matter of Shirdel*, Int. Dec. 2958 (BIA 1984). The decisionmaker might not want to award such an applicant with the "greater" relief of asylum which would qualify him or her for lawful permanent residence one year later. On the other hand, since these matters often involve life and death, § 243(h) withholding must be granted to such a person, but only if a higher standard of proof of persecution is established. Furthermore, under Article 33 of the U.N. Convention, which is the source for § 243(h), the United States' obligation of *nonrefoulement* requires withholding of deportation in such circumstances, yet does not require admission as a lawful permanent resident. This result surely does not render § 243(h) superfluous or useless as suggested by the Petitioner.<sup>39</sup>

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"Meeting the definition of 'refugee,' however, does not entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208 (a)." *Id.* at 423, n. 18.

<sup>39</sup>In an effort to minimize the distinguishing factor of discretion unique to asylum, the Petitioner boldly states that, as a matter of discretion, the Attorney General would never deport a person to the country of persecution when that person was eligible for relief. Pet. Brief at 20-22. The Petitioner's contention is nonsensical. Since the Board does not now apply two different standards of proof, the situation has not and cannot arise wherein an applicant establishes a well-founded fear of persecution but not a clear probability of persecution. Because

(Continued on following page)



### CONCLUSION

The Refugee Act of 1980 codified for the first time an asylum statute which adopted an expanded version of the internationally accepted definition of refugee. The legislative history of the Refugee Act supports the conclusion that Congress specifically intended to incorporate a generous standard of proof for the new asylum provision based on the United Nations Protocol. The definition includes the well-founded fear of persecution standard of proof which, by its plain language and historical origins, is more generous than the clear probability standard applicable to withholding of deportation.

In view of the humanitarian spirit of the Refugee Act of 1980 and the life or death consequences involved, the Ninth Circuit correctly held that asylum applicants need only submit evidence which would lead a reasonable person to believe that he or she may be persecuted, i.e. that persecution is a reasonable possibility. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DANA MARKS KEENER

KIP STEINBERG

SUSAN M. LYDON

BILL ONG HING

*Attorneys for Respondent*

July 1986

(Continued from previous page)

the Board is applying the same clear probability standard to both asylum and withholding, in every case where a clear probability of persecution has not been established, both applications are denied on eligibility grounds, and thus the issue of discretion is never reached.

### RESPONDENT'S APPENDIX

UNITED NATIONS HIGH COMMISSIONER  
FOR REFUGEES

HAUT COMMISSARIAT DES NATIONS  
UNIES POUR LES REFUGIES

Delegation A Washington

Washington Liaison Office

1785 Massachusetts Ave., N.W.

Washington, D.C. 20036

Telephone: (202) 387-8546

January, 1982

Dear Mr Steinberg:

\* \* \*

D. *Comments on Certain Aspects of the definition of the term "Refugee"*

The *Handbook* deals with most of the issues mentioned below. Our present comments are simply in elaboration of what is contained therein.

- a. *Burden of Proof*—The granting of asylum is a legal as well as a humanitarian act and since decisions on asylum may well decide the life or death of a person, UNHCR strongly holds that a high standard of fairness is essential in any asylum determination process. Thus, while in principle, the burden of establishing a valid claim rests with the individual claimant, unless there is reason to the contrary to doubt the credibility of a claimant, the benefit of the doubt should always be given to him even in the absence of other corroborative evidence. In UNHCR's view, therefore, the "balance of probabilities" standard is rather strict since any doubt should be resolved in favor of the claimant.
- b. *Application of the "Refugee Definition"*—UNHCR advocates liberal interpretation and application of the refugee definition in consonance with the



fundamental humanitarian character of the institution of asylum. A narrow and rigidly legalistic application of the definition would inevitably leave a large number of *bonafide* asylum seekers without refuge and would subvert the spirit of the Convention and/or Protocol. Immigration considerations, in particular, must not be brought to bear on the application of the refugee definition. The possibility for instance that, if one person were given asylum status, many others might also be entitled to claim asylum status is not a relevant consideration as to whether the asylum claim is a valid one. Moreover, any assumption of an abuse of procedures in order to gain entry into a country should not be allowed to weigh negatively in a judgment on the merits of specific asylum applications; such a posture would lead inevitably to a subversion of the spirit of national commitments to the Convention and Protocol.

- c. *Fear of Persecution*—Refugees are generated by conditions, political in the broadest sense, which render continued residence intolerable or impossible. Concerned as it must be with events which have not yet occurred, the refugee definition relates to with possibilities and probabilities rather than certainties. While past persecution is evidence to substantiate a well-founded fear, it need not be the only evidence. What has happened to others in similar circumstances, for instance, may be sufficient evidence of a well-founded fear of persecution. Where measures of persecution are found to be directed against a group of persons which have common characteristics, such measures must as a rule be considered to be directed against every member of the persecuted group. And a person who has not been persecuted simply because he has not yet attracted the attention of his government, need not wait until detection and persecution before he can claim refugee status. Nor need he be under the threat of imminent persecu-

tion. Moreover, a person need not be singled out for persecution in order to be a refugee; each claim however, must be assessed individually and once that takes place, it ought not to be rejected simply because a large number of others could also legitimately fear the same persecution.

• • •

Sincerely,  
Kallu Kalumiya  
Legal Officer

UNITED NATIONS [SEAL] HAUT COMMISSARIAT  
HIGH COMMISSIONER DES NATIONS UNIES  
FOR REFUGEES POUR LES REFUGIES  
Washington Liaison Office Delegation A Washington  
1785 Massachusetts Ave., N.W.  
Washington, D.C. 20036 Telephone: (202) 387-8546  
April 15, 1982

Mr. K. Steinberg  
Simmons and Ungar  
517 Washington Street, Suite 301  
San Francisco, California 94111

Dear Mr. Steinberg;

With reference to the letter we sent you early this year concerning, among other things, the UNHCR mandate and the definition of refugee as well as the situation of Salvadoran asylum seekers, two corrections should be noted:

- i. at page four paragraph D. a "Burden of Proof"—the last sentence should read:

"In UNHCR's view, therefore, *the clear probability standard* is rather strict since any doubt should always be resolved in favor of the claimant."

App. 4

- ii. at page seven, paragraph F. "Conclusions of the Executive Committee on the Protection of Asylum Seekers in Situations of Large-Scale Influx", the first sentence should read as follows:

"At its 32nd Session (20 October 1981) the Executive Committee, of which the United States is a member, unanimously adopted the following recommendations with regard to protection of asylum seekers in situations of large-scale influx: . . ."

We apologize for any inconvenience that may have been caused by these errors.

Sincerely,

United Nations High Commissioner  
for Refugees  
Washington Liaison Office

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(11)  
No. 85-782

Supreme Court, U.S.

FILED

SEP 25 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**REPLY BRIEF FOR THE PETITIONER**

CHARLES FRIED

*Solicitor General*

RICHARD K. WILLARD

*Assistant Attorney General*

LAWRENCE G. WALLACE

*Deputy Solicitor General*

ROY T. ENGLERT, JR.

*Assistant to the Solicitor General*

LAURI STEVEN FILPPU

DAVID V. BERNAL

*Attorneys*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

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No. 85-782

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

*v.*

LUZ MARINA CARDOZA-FONSECA

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**REPLY BRIEF FOR THE PETITIONER**

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The United States has recognized the phrase "well-founded fear of persecution" as an element of "refugee" status since 1968, when the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, and that phrase has been construed in this country since 1973 (*In re Dunar*, 14 I. & N. Dec. 310 (Board of Immigration Appeals 1973)). It has been a part of U.S. statutory law since passage of the Refugee Act of 1980 (the Act), Pub. L. No. 96-212, 94 Stat. 102 *et seq.* Both before and after passage of the Act, the Board of Immigration Appeals determined that there is no meaningful or practical distinction between "well-founded fear of persecution" and the likelihood or clear probability standard under Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h). *In re Dunar, supra*; *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 29a-68a); see *INS v. Stevic*, 467 U.S. 407, 418-420



(1984) (discussing *Dunar* and its progeny).<sup>1</sup> The Board, of course, reached that interpretation by analyzing the Protocol and the legislation and by applying its expertise in the application of verbal formulations to the actual facts of refugee cases (see Gov't Br. 11, 29-30). This Court's precedents require that that longstanding interpretation be accepted unless it is unreasonable, even if some other interpretation of the statute might seem "more natural" to some observers. *Young v. Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 6.<sup>2</sup> Respondents and amici have not come close to showing that the agency's interpretation of the statute is unreasonable.

1. Respondent first argues that the Court should begin and end its inquiry by looking to the "plain language" of the Act (Resp. Br. 5-10; see also IHR LG Br. 12-14). But the language of the Act is far from plain. "Well-

<sup>1</sup> This Court held in *Stevic* that the likelihood or clear probability standard under Section 243(h) means that the alien must show that persecution is more likely than not (467 U.S. at 424).

<sup>2</sup> Respondent and amici offer only insubstantial arguments in asking this Court to depart from its usual policy of deference. Respondent claims (Br. 38-40) that deference is appropriate only when Congress has "delegated" the interpretative task to the agency. This Court's precedent, however, is to the contrary. See, e.g., *Community Nutrition Institute* (deferring to Secretary's determination whether statute required or merely authorized him to follow certain procedures). Amici curiae International Human Rights Law Group et al. (IHR LG) argue that deference is inappropriate in the present case because the agency's interpretation predates the Refugee Act of 1980, and that failure to change that interpretation after passage of the Act shows agency recalcitrance (IHR LG Br. 9, 20-22). That argument, of course, begs the question whether the Act was intended to alter the prior interpretation. As we showed in our opening brief (at 25-28), the legislative history demonstrates congressional acceptance of prior agency interpretation of "well-founded fear." And, even if "the legislative history [were] not unambiguous, it certainly [would be] no support for assertions that the [BIA's] interpretation of § [208] is insufficiently rational to warrant our deference." *Community Nutrition Institute*, slip op. 9.

founded fear of persecution" is a term of art with a history of administrative and judicial interpretation, and Congress's intention was that it be construed by reference to past usage, not by reference to a dictionary. Nonetheless, dictionary definitions of "well-founded" are consistent with the construction that the agency has long followed. The concepts of "'based on good or sure grounds or reasons'" (Resp. Br. 8 (quoting 12 *Oxford English Dictionary* 295 (1933))) and "ha[ving] a firm foundation in fact" (*In re Acosta-Solorzano*, Pet. App. 51a (citing *Webster's Third New International Dictionary* 2925 (1976))) are themselves subject to interpretation and could well be interpreted to mean that a fear, to be well founded, must be more likely of realization than not.

In a related argument, respondent asserts that "well-founded fear of persecution" must mean something different from the Section 243(h) standard simply because the words "well-founded fear of persecution" are not used in Section 243(h) (Resp. Br. 8-9, 46; see also United Nations High Commissioner of Refugees (UNHCR) Br. 5-6). It is true that there is a general presumption that different words used in different sections of a statute have different meanings. *Russello v. United States*, 464 U.S. 16, 23 (1983). But that general presumption is not irrebuttable, and we have shown in our opening brief that there is abundant reason to believe that Congress chose different words to express equivalent concepts in Sections 208 and 243(h). The general presumption of *Russello* does not suffice to overturn the agency's consistent determination that "well-founded fear of persecution" is in practical application the same as a likelihood or clear probability of persecution.

2. Respondent correctly points out that asylum and withholding of deportation substantially differ from one another (Resp. Br. 10-11, 44-45).<sup>3</sup> Respondent suggests

<sup>3</sup> Some amici, however, have missed this fundamental point. They confuse asylum with *nonrefoulement* when they contend that the asylum provisions of the Act were intended to bring the United

that it must follow that a different (and more generous) standard of eligibility applies to asylum. Quite the contrary, the more extensive relief given an asylee contradicts any notion that eligibility standards for asylum could be more encompassing than eligibility standards for withholding of deportation (see Gov't Br. 18-22).

Respondent contends that, because the Attorney General has discretion to deny asylum to persons with a well-founded fear of persecution, Congress could have intended to make asylum available on the basis of a lower threshold showing than that required for the lesser benefit of withholding of deportation (Resp. Br. 46-47; see also IHRLG Br. 24-27). The fallacy of that argument was shown in our opening brief (at 21-22 & n.15). As we said there, Congress could not have intended to create a class of aliens who had a "well-founded fear"—but not a likelihood—of persecution, some of whom the Attorney

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States into conformity with its obligations under the Protocol (see UNHCR Br. 6-7, 25; Lawyers Committee for Human Rights et al. (LCHR) Br. 30-31, 38-39). Under the Act, and in international usage, "asylum" entails a possibility of lawfully remaining in the country of refuge, not just a right not to be returned to the country of probable persecution. See 8 U.S.C. 1159(b); G. Goodwin-Gill, *The Refugee in International Law* 225 (1983). The obligation of the United States under the Protocol is one of *nonrefoulement*, i.e., not to return the alien to the country of probable persecution, and that is precisely the relief granted by withholding of deportation. See *INS v. Stevic*, 467 U.S. 407, 429-430 n.22 (1984). Neither the United States nor any other nation has any international obligation whatsoever to grant asylum. G. Goodwin-Gill, *supra*, at 103-104, 107, 119, 121, 225. Respondent generally recognizes the distinction between our *nonrefoulement* obligation and our lack of any international obligation to grant asylum (Resp. Br. 6 & n.1, 13 n.9, 47). At one point, however, respondent joins amici in the incorrect suggestion that the statutory asylum provisions—as opposed to other portions of the Act—were intended to achieve conformity with the Protocol (Resp. Br. 12-13). The asylum section does condition eligibility on status as a "refugee" under Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), which is derived from the Protocol, but it does not correspond to any *obligation* under the Protocol.

General might return to a country in which they would have such good reason to fear persecution, while granting others asylum despite their ineligibility for withholding of deportation.<sup>4</sup> But Congress could have intended to—and did—create a system in which a likelihood of persecution is both necessary and sufficient to *require* withholding of deportation and to make the alien eligible for the additional benefits of asylum, if granted in the Attorney General's discretion.<sup>5</sup>

3. Respondent agrees with us that the "well-founded fear" language in the Act is taken from the Protocol and the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (Resp. Br. 11-18). We showed in our opening brief (at 22-28) that the Protocol's well-founded fear standard had a settled interpretation in U.S. law by 1980, and that Congress intended that interpretation to be continued. Respondent, however, urges the Court to disregard the authoritative U.S. interpretation of the Protocol that existed in 1980, asserting three bases for her argument that the Act modified that interpretation. None withstands scrutiny.

First, respondent claims (Br. 15) that "no uniform practice had \* \* \* existed [before the Act] for the treatment of refugees under the United Nations definition." That is true, in the sense that refugees were admitted to the United States under three different procedures before the Act. It was that absence of a uniform practice that Congress observed (see Gov't Br. 12-13 & n.6). That

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<sup>4</sup> See also T. Aleinikoff & D. Martin, *Immigration Process and Policy* 666 (1985).

<sup>5</sup> Thus, amici err in arguing that we have ignored the discretion of the Attorney General under Section 208 or that our reading of the statute would render Section 243(h) superfluous (IHRLG Br. 25-27). The Attorney General's discretion under Section 208 is of vital importance in determining which refugees, among those for whom withholding of deportation is mandatory, will be granted asylum, which can lead to permanent residence, and which ones may instead be deported to a country other than the one where they face persecution.



observation has nothing whatsoever to do with the uniformity of interpretation of the Protocol definition.

Second, respondent (Br. 15-16) characterizes our argument as one of "silent ratification" of the INS's 1979 asylum regulations (8 C.F.R. Pt. 108 (1980)), which equated "well-founded fear" under the Protocol with "likelihood of persecution" (44 Fed. Reg. 21253, 21257 (1979)).<sup>6</sup> But the interpretation that Congress ratified is not found in the 1979 regulations alone, but in *In re Dunar*, *supra*, and other administrative and judicial decisions discussed in our opening brief.<sup>7</sup> Nor does our argument depend on congressional silence. Far from being silent, Congress chose to use in the statute the

<sup>6</sup> Amici attack the 1979 regulations by ignoring the INS's reasoning (IHRLG Br. 20-21 & n.8). Amici suggest that the INS never explained its basis for asserting in the discussion accompanying the 1979 regulations that "well-founded fear" was the semantic equivalent of other formulations used in the regulations, but in fact the INS explained (44 Fed. Reg. 21257) that it was relying on *In re Dunar*, *supra*. And amici mischaracterize the regulations when they assert that the INS "rejected" the well-founded fear standard (IHRLG Br. 53). The words "well-founded fear" did not appear in 8 C.F.R. 108.3(a) (1980) because the INS treated that standard as equivalent to a likelihood standard, not because any standard was rejected.

<sup>7</sup> Respondent seeks to belittle *Dunar* and cases following it on the ground that *Dunar* was not an asylum case (Resp. Br. 41, 42 n.35). That is beside the point. *Dunar* was the watershed case interpreting "well-founded fear of persecution" as used in the Protocol (see *Stevic*, 467 U.S. at 418-420), and it is the Protocol definition that Congress has made applicable to asylum claims. There is also no substance to respondent's argument that the BIA has "vacillated" in its interpretation of "well-founded fear" (Resp. Br. 42-43). The BIA has consistently applied a "likelihood" test, as shown by the very quotations in respondent's brief. That the BIA has sometimes used varying phrases in holding that certain aliens were or were not likely to suffer persecution shows only that there are many ways of expressing the same concept, not that different standards have been applied in different cases. Cf. *Stevic*, 467 U.S. at 424 n.19 ("clear probability" and "likelihood" are interchangeable standards); *id.* at 429-430 ("more likely than not" is same standard as "clear probability of persecution").

words "well-founded fear of persecution," whose U.S. interpretation Congress must be presumed to have known. See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). And the legislative history shows acceptance of that interpretation, not just through the complete absence of complaint about that interpretation, but affirmatively through the Senate Report and the hearing testimony of an administration witness (see Gov't Br. 26).<sup>8</sup> Respondent ignores these parts of the legislative history; amici offer contradictory arguments for disregarding the Senate Report<sup>9</sup> and plainly incorrect arguments for disregarding Mr. Martin's testimony.<sup>10</sup>

<sup>8</sup> That witness, David Martin, is a former State Department official who was deeply involved in the Department's work on the Act (see Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Y.B. Int'l Legal Stud. 91, 91 n.\*) and a coauthor of a leading text (T. Aleinikoff & D. Martin, *supra* note 4).

<sup>9</sup> The Senate Report stated that "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979). IHRLG et al. argue that this statement is "plainly inapposite" because the Senate bill was not adopted (IHRLG Br. 57 n.35). UNHCR argues, however, that this statement accurately describes the legislation that was passed and that the "substantive standard" mentioned is the Protocol definition, not the U.S. interpretation of that definition (UNHCR Br. 8). What the Senate Report plainly said was that asylum would *continue* to be granted under the Protocol definition, which was found in both the Senate bill and the House bill eventually enacted. The Report unmistakably endorsed past U.S. practice of granting asylum under the Protocol definition and stated that use of the Protocol definition in the Act would not change the substantive standard.

<sup>10</sup> Mr. Martin's testimony was that, "[f]or purposes of asylum, the provisions in this bill do not really change the standards." *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (emphasis added). Amici imply that Mr. Martin's 1979 testimony used the word "asylum" to refer to conditional entry under old Section 203(a)(7), 8 U.S.C. (1976 ed.) 1153(a)(7) (IHRLG Br. 58 n.35). Mr. Martin, however, well



Third, respondent relies on a statement by Senator Kennedy that she reads as critical of the interpretation of "well-founded fear" used in the 1979 regulations (Br. 17; see also IHRLG Br. 55-56). But Senator Kennedy said nothing about the well-founded fear standard. His remarks, in context, show that Congress's goal in providing for statutory asylum was to ensure uniformity in U.S. asylum practice by changing the "procedures."<sup>11</sup>

understood the distinction between asylum and the quota system of conditional entry. See T. Aleinikoff & D. Martin, *supra* note 4, at 618; Martin, *supra* note 8, 1982 Mich. Y.B. Int'l Legal Stud. at 93, 109-110, 112. Another administration witness had just explained to Congressman Fascell that the bill provided considerably broader means of entry into the United States than Section 203(a) (7), because it eliminated ideological and geographic restrictions. The point Mr. Martin added was that, although the bill in that respect broadened the standards that had been used for conditional entry, it did not broaden the standards that had been used for asylum.

UNHCR points out (Br. 8) that Mr. Martin later testified before Congress that problems relating to asylum did not become fully apparent until after the Refugee Act of 1980 was in place. Mr. Martin's 1981 testimony, however, supports our position. Mr. Martin pointed out that, although the language of the "well-founded fear" standard might appear broad to some, "U.S. case law and international practice in applying this particular standard \* \* \* demonstrate that it is, in fact, a narrow standard" that should be "reaffirmed." *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 127 (1981) [hereinafter 1981 Senate Hearings]. The case law to which Mr. Martin referred was *Fleurinor v. INS*, 585 F.2d 129, 133 (5th Cir. 1978), and *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977), which are discussed in our opening brief. See Martin, *supra* note 8, 1982 Mich. Y.B. Int'l Stud. at 113, 122 n.99.

<sup>11</sup> Senator Kennedy's statement reads: "It is the intention of the Conferees that the Attorney General should immediately create a uniform procedure for the treatment of asylum claims filed in the United States or at our ports of entry. Present regulations and procedures now used by the immigration Service simply do not conform to either the spirit or to the new provisions of this Act." 126 Cong. Rec. 3757 (1980) (emphasis added).

There is no evidence that Congress had any quarrel with the likelihood standard previously applied to regulatory asylum claims. Senator Kennedy had earlier remarked that "Section 207(b) [which became Section 208] improves and clarifies the procedures for determining asylum claims filed by aliens who are physically present in the United States" (125 Cong. Rec. 23233 (1979) (emphasis added)), and procedural reform of the 8 C.F.R. Pt. 108 (1980) regulations was a theme of both the Senate Report and the House Report.<sup>12</sup> The Senate Report reiterated Senator Kennedy's reference to what eventually became Section 208 as "improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States" and stated in the very next sentence that the substantive standard was not changed. S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979). The House Report confirmed that Congress's aim was simply to provide a "statutory basis" for existing "United States asylum policy," which the House Report noted was then governed by the regulations at 8 C.F.R. Pt. 108 (1980). H.R. Rep. 96-608, 96th Cong., 1st Sess. 17 (1979).

4. Respondent claims that Congress, in creating the asylum provision, intended to retain refugee admission standards in prior refugee statutes, which she contends were more generous than the "likelihood" standard (Resp. Br. 18-21; see also IHRLG Br. 30-41). A fair reading of the legislative history refutes that contention.

a. The House Report on the Refugee Act of 1980, in a section labeled "background," discussed refugee laws

<sup>12</sup> Section 208 does in fact significantly change the procedures for grant of asylum. Under 8 C.F.R. 108.1 (1980), the only aliens within the United States who could apply for asylum in advance of a deportation or exclusion proceeding were those who were maintaining a lawful status within the United States or whose presence in the United States was authorized. Section 208(a), 8 U.S.C. 1158(a), requires the Attorney General to "establish a procedure for an alien physically present in the United States \* \* \*, irrespective of such alien's status, to apply for asylum" (emphasis added).

that were in force between 1948 and 1965. H.R. Rep. 96-608, *supra*, at 2-3. Not a word of the legislative history suggests that the definitions of "refugee" contained in those special relief Acts was to be carried over into the new legislation. For that reason, respondent's reliance on pre-1964 legislation is misplaced (Resp. Br. 19-20; see also IHRLG Br. 31-36). Moreover, very limited relief was made available to refugees under those Acts, and it is for that reason that the few reported decisions construing them may have given a broad construction to their definitions of "refugee." For example, Section 6 of the Refugee Relief Act of 1953, 67 Stat. 403, required only that the alien unable to return home to an Iron Curtain country because of "persecution or fear of persecution" not be deported until after the Attorney General brought his case to Congress's attention; and it affirmatively required that he be deported notwithstanding his persecution or fear of persecution unless both Houses of Congress passed a concurrent resolution approving the grant of permanent residence.<sup>13</sup>

b. There is even less basis for respondent's reliance on former Section 203(a)(7), which was added to the

<sup>13</sup> See *Cheng Fu Sheng v. Barber*, 269 F.2d 497, 498-500 (9th Cir. 1959). The other cases cited by respondent and amici are not a definitive interpretation that even the pre-1965 legislation required less than a showing of likelihood of persecution, let alone an interpretation of the 1967 Protocol or the 1980 legislation. In *Lavdas v. Holland*, 139 F. Supp. 514 (E.D. Pa. 1955), *aff'd*, 235 F.2d 955 (3d Cir. 1956), and *Mascarin v. Holland*, 143 F. Supp. 427 (E.D. Pa. 1956), the courts simply determined that each alien lacked even a reasonable basis to fear persecution; they did not set a standard for other cases. *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715 (2d Cir. 1955), was a Section 243(h) case, and Judge Frank expressly equated that Section's standard with the "fear of persecution" standard in the 1948 and 1953 legislation (234 F.2d at 718 n.2). Therefore, if it were relevant, *Fong Foo* would support our position that there is only one standard for refugee admissions. To the extent that *Fong Foo* suggested that the uniform standard is less than a likelihood or clear probability of persecution, it is inconsistent with *Stevic*.

Immigration and Nationality Act in 1965 (Pub. L. No. 89-236, § 3, 79 Stat. 913), as a guide to the meaning of Section 208 (Resp. Br. 20; see also IHRLG Br. 36-41, 56-57). Congress's concern in 1980 was to *replace* the piecemeal approach to the admission of refugees, which was accomplished under former Section 203(a)(7) (conditional entry) and former Section 212(d)(5), 8 U.S.C. (1976 ed.) 1182(d)(5) (parole), and 8 C.F.R. Pt. 108 (1980) (asylum for aliens physically in the United States), with a systematic scheme for the admission of refugees. *INS v. Stevic*, 467 U.S. at 425 (citing legislative history). In this regard, Congress repealed Section 203(a)(7), restricted the use of parole for the admission of refugees (8 U.S.C. 1182(d)(5)(B)), and provided a statutory basis for the consideration of "asylum" applications under the 8 C.F.R. Pt. 108 (1980) regulations. To the extent that Congress sought to preserve a substantive standard from among the three procedures previously used for refugee admissions, it sought to preserve the regulatory asylum standard of Part 108, not the conditional-entry standard of Section 203(a)(7).<sup>14</sup>

As we pointed out in our opening brief (at 12-13, 27), Section 207 (8 U.S.C. 1157) and Section 208 as added

<sup>14</sup> The House explicitly noted that it intended to provide a statutory basis for the Part 108 regulatory asylum policy (H.R. Rep. 96-608, *supra*, at 17). The Senate also had regulatory asylum rather than conditional entry in mind when it referred to improving the procedures but maintaining the substantive standard for determining "asylum claims filed by aliens who [were] physically in the United States" (S. Rep. 96-256, *supra*, at 9). As Congress surely knew, conditional entry was predominantly used for refugee admissions from abroad, not for aliens physically in the United States. Statistics kept by the Immigration and Naturalization Service show that 44,488 aliens were admitted from abroad under former Section 203(a)(7) between July 1975 and September 1979, whereas only 2584 were "admitted" under that provision on the basis of adjustment-of-status applications by aliens who were in the United States. Conditional entry and parole were understood by Congress as the vehicles for bringing refugees into this country from abroad. See H.R. Rep. 96-608, *supra*, at 3-4.



by the 1980 legislation make asylum potentially available to a large number of refugees who were ineligible for conditional entry because of Section 203(a)(7)'s geographic and ideological restrictions. In addition, because of those restrictions and tight numerical limitations on the number of aliens admitted under Section 203(a)(7), the majority of refugees who entered the United States before 1980 did so under the Attorney General's discretionary Section 212(d)(5) "parole" authority.<sup>15</sup> Parole was and is a temporary, limited form of relief that "shall not be regarded as an admission of the alien" (8 U.S.C. (1976 ed.) 1182(d)(5); 8 U.S.C. 1182(d)(5)(A)). Sections 207 and 208 make the comprehensive benefit of asylum potentially available by statute to refugees who, because of the restrictions in Section 203(a)(7), would have been denied statutory relief altogether or given only the limited statutory benefit of parole, and in *that* sense they are considerably broader than Section 203(a)(7), as observed in the Senate Report (S. Rep. 96-256, *supra*, at 1, 4). But, contrary to amici's assertions (IHRLG Br. 31, 40-41 & n.21), the legislative history does not show and we have not conceded that "well-founded fear of persecution" as used in the 1980 legislation is as broad a phrase as "fear of persecution" as used in Section 203(a)(7). The most reliable guides to the meaning that Congress assigned to "well-founded fear of persecution" are prior U.S. interpretations of that phrase as used in the Protocol, not prior interpretations of "fear of persecution" as used in Section 203(a)(7).

Even so, it appears that an alien proceeding under Section 203(a)(7) did indeed have the "burden of demon-

<sup>15</sup> Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearings Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong. 1st Sess. 10 (1979); S. Rep. 96-256, *supra*, at 1-2, 5-6; H.R. Rep. 96-608, *supra*, at 2, 4, 11.

strating the likelihood of persecution," i.e., the burden of meeting the Section 243(h) standard. *Ishak v. District Director*, 432 F. Supp. 624, 626 (N.D. Ill. 1977). Although one District Director once said that an applicant had "offered no credible testimony or other evidence that he was persecuted or had good reason to fear persecution" (*In re Ugricic*, 14 I. & N. Dec. 384, 385-386 (1972)), such a statement hardly amounts to a holding that "good reason" was all an applicant had to show in order to be eligible for conditional entry, or that "good reason" is a lesser standard than likelihood or clear probability. And the Board of Immigration Appeals never had jurisdiction over Section 203(a)(7) determinations (see *Stevic*, 467 U.S. at 416 n.8), so the Board never determined the appropriate standard under Section 203(a)(7).<sup>16</sup>

<sup>16</sup> See *In re Acosta-Solorzano* (Pet. App. 42a-43a). The Board did comment in two Section 243(h) cases on the lack of identity between that Section and Section 203(a)(7), but never did it say that the test of "persecution or fear of persecution" under Section 203(a)(7) was less stringent than a likelihood or clear probability of persecution as required under Section 243(h). The thrust of *In re Tan*, 12 I. & N. Dec. 564 (1967), was the then-discretionary nature of the determination required of the Attorney General under Section 243(h) concerning whether the alien would be subject to persecution in his own country (see *In re Tan*, 12 I. & N. Dec. at 566, 568-569). It was the existence of that element of discretion that led the Board to reject the claim (*id.* at 569-570) "that an alien deportee is required to do no more than meet the standards applied under section 203(a)(7) of the Act when seeking relief under section 243(h)." See also *In re Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968). And in *In re Adamska*, 12 I. & N. Dec. 201, 202 (1967), the Regional Commissioner observed only that Section 203(a)(7)'s standard was broader than the "would be subject to physical persecution" standard of the pre-1965 version of Section 243(h) (8 U.S.C. (1964 ed.) 1253(h)). *Adamska* tells us nothing about the relationship between Section 203(a)(7) and the post-1965 version of Section 243(h), which the Board recognized was broader than the pre-1965 version (*In re Janus & Janek*, 12 I. & N. Dec. at 876).



5. Despite the uniform interpretation of the Protocol phrase "well-founded fear of prosecution" in this country from 1973 until passage of the Refugee Act, respondent urges the Court to forsake that interpretation in favor of a de novo examination of the negotiating history of the Convention or interpretations reached by international bodies or foreign courts (Br. 24-27 & n.20; see also IHR LG Br. 44-52; UNHCR Br. 1130; LCHR Br. 33-64). There is no sufficient basis for the Court to do so. In any event, the negotiating history and other countries' interpretations of the phrase are consistent with the U.S. interpretation.

a. The meaning placed on the term "well-founded fear" by the United Nations Ad Hoc Committee that drafted the refugee provision, which eventually became Article 1 of the Convention—"good reason" to fear persecution—is itself subject to interpretation.<sup>17</sup> Nothing in those two words is inconsistent with a likelihood standard. Indeed, a natural interpretation of the words "good reason"—and the interpretation adopted by the Board since it first had occasion to review the negotiating history (*In re Dunar*, 14 I. & N. Dec. at 319)—is that they are used to distinguish mere subjective fear from fear based on an objective likelihood of persecution.<sup>18</sup> The one standard that was indisputably rejected through use of the words "good reason" was the standard that respondent seems to endorse: that the alien need only show a

<sup>17</sup> United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39, U.N. Doc. E/1618, E/AC.32/5 (Feb. 17, 1950), reprinted in 11 U.N. ESCOR Annex (Agenda Item 32) at 11, U.N. Doc. E/1618 & Corr. 1 (1950).

<sup>18</sup> Like the Board in *In re Dunar*, the Seventh Circuit, in equating the "well-founded" and "clear probability" standards, stated that its interpretation of "well-founded" conformed with the understanding of the United Nations Ad Hoc Committee, which had drafted the definition of "refugee." *Kashani v. INS*, 547 F.2d 376, 379 (1977).

"plausible account" of persecution. See United Nations Economic and Social Council, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems* 33-34, U.N. Doc. E/AC.32/L.38 (Feb. 15, 1950); *Acosta-Solorzano* (Pet. App. 49a n.11).<sup>19</sup> In sum, as stated by the Board in *Acosta-Solorzano*: "To the extent that such words ['good reason'] could be interpreted to mean that an alien's fear of persecution need only be plausible, they do not reflect the generally understood meaning of 'well-founded'" (Pet. App. 53a).

A leading authority on international refugee law, Atle Grahl-Madsen, has confirmed that "good reason" to fear persecution as used in the negotiating history means something more objective than a mere plausible account. "[G]ood reasons" may relate to any set of circumstances which may serve as an indication of the *likelihood* of future persecution." 1 A. Grahl-Madsen, *supra* note 19, § 78, at 179 (emphasis added); see also *id.* at 181. Indeed, although it may be open to other readings as well, Grahl-Madsen's treatise in some places appears to endorse exactly the standard we suggest: "'Well-founded fear of being persecuted' may \* \* \* be said to exist, if it is *likely* that the person concerned will become the victim of persecution if he returns to his country of origin" (*id.* § 76, at 175 (emphasis added); see also *Acosta-Solorzano* (Pet. App. 48a-49a)).

<sup>19</sup> Amicus UNHCR (Br. 16-20) has not shown why the drafters of the Convention definition of refugee substituted the "good reason" language for the words "plausible account." Furthermore, UNHCR does not claim that the words "good reason," or for that matter "well-founded" fear of persecution, were used to describe the International Refugee Organization definition of refugee (which UNHCR contends the drafters had no intention of changing). The new well-founded fear definition, together with the change in its description to "good reason," appear to have reflected a desire that a "more objective yardstick" be used to measure the claim to "refugeehood." See 1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 173 (1966). The ordinary meaning of the phrase "well-founded," after all, is "good or sure grounds or reasons" and not simply "plausible account." See page 3, *supra*.

b. Amici are incorrect in their claim (LCHR Br. 33-39; UNHCR Br. 21-24) that this Court should look to the laws of other countries for an internationally accepted construction of the term "well-founded fear" or "refugee." In a case that does not involve any international obligations of the United States, but only incorporation in a domestic statute of the Protocol phrase "well-founded fear of persecution" (see note 3, *supra*), there is simply no authority for ignoring the consistent domestic construction of that phrase in favor of an interpretation by the domestic court of some foreign country. In enacting the Refugee Act of 1980, Congress expressed a desire not to alter the substantive standard for asylum, which depended on the domestic construction of "well-founded fear." Thus, when Congress stated that the new refugee definition would bring U.S. law into "conformity with the internationally-accepted definition of the term 'refugee'" set forth in the Protocol (H.R. Rep. 96-608, *supra*, at 9), it did not thereby intend to abdicate "construction" of the definition to non-U.S. sources that might have a different interpretation.

Nor does the *Handbook* cited by amici<sup>20</sup> provide authority for overriding the judgment of the Board of Immigration Appeals on this matter. *First*, although the *Handbook* may indeed be a useful source in many respects, the UNHCR acknowledges (*Handbook* 1) that "[t]he assessment as to who is a refugee, i.e., the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status." Under general principles of international law, only the parties to a treaty can authoritatively interpret its provisions. See *Draft Convention on the Law of Treaties*,

<sup>20</sup> Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva 1979) [hereinafter *Handbook*].

29 Am. J. Int'l L. Supp. 654, 973 (1935). Although the parties may entrust that interpretative power to some other state or body by agreement, the parties to the 1951 Convention and 1967 Protocol have not entrusted the interpretative power to the UNHCR.<sup>21</sup> *Second*, the *Handbook* was published in 1979, six years after *Dunar*, and cannot be considered a sufficiently contemporaneous or authoritative interpretation of the Protocol to overturn the prior authoritative interpretation in this country. *Third*, to the extent that amici would have the Court read the *Handbook* as if it stood for the proposition that "well-founded fear" is essentially a subjective test rather than an objective test in which subjective fear may play a part, their argument is inconsistent with both U.S. and international authority. See *In re Dunar*, 14 I. & N. Dec. at 319; INS, *Draft Worldwide Guidelines for Overseas Refugee Processing* 8-9, 25 (Oct. 1985); 1 A. Grahl-Madsen, *supra* note 19, § 76, at 174.<sup>22</sup>

Finally, the glimpse into foreign law provided by amici (UNHCR Br. 24-25 nn.50-52, 29 & n.56; LCHR Br. 40-64) does not begin to show the kind of uniform

<sup>21</sup> The parties have agreed to resolution of certain disputes about interpretation of the Protocol by the International Court of Justice (Protocol Art. IV, 19 U.S.T. 6226), but that court has never construed the term "refugee." The UNHCR, by contrast, "is charged with providing international protection to refugees, and is required *inter alia* to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application" (*Handbook* 6). In light of this "protection" function, it is not surprising that the UNHCR takes opportunities to encourage especially generous construction of the term "refugee" in various nations.

<sup>22</sup> Furthermore, "it cannot be certain to what extent the position in the *Handbook* reflects concepts that are outside the strict definition of a 'refugee' under the Protocol" (*Acosta-Solorzano*, Pet. App. 43a-44a n.8), because the jurisdiction of the UNHCR extends beyond those who meet the Protocol definition (*id.* at 43a n.8; see Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. Mich. J.L. Ref. 165, 174 & n.37 (1984)).



foreign interpretation of the Protocol that would be required in order to call into question the consistent U.S. interpretation. Virtually none of the cited foreign decisions interprets the Protocol or Convention; virtually all interpret domestic constitutions and statutes. Moreover, some of the cited decisions, as described, appear to adopt "likelihood" of persecution as the substantive standard (see LCHR Br. 56-58 (France)), and, with two exceptions, none appears to have focused on whether "likelihood" was or was not the proper standard.<sup>23</sup> Those two exceptions are British decisions that in fact support the interpretation by the Board of Immigration Appeals.<sup>24</sup> Thus, there is no uniform foreign interpretation inconsistent with the U.S. interpretation. Moreover, the international practice in this area cannot be ascertained without giving significant attention to the practice of the

<sup>23</sup> The Canadian decision in *Kwiatkowski v. Minister of Manpower & Immigration*, 142 D.L.R.3d 385 (1982), discussed by LCHR (at 44-45), did not involve the question whether refugee status required that the applicant be more likely than not to suffer persecution. It involved the question whether the applicant was required to show that he was more likely than not to establish refugee status in order to obtain a redetermination hearing.

<sup>24</sup> In *Fernandez v. Government of Singapore*, [1971] 1 W.L.R. 987, the House of Lords interpreted an extradition statute in which the key phrase was that the applicant "might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions" (see LCHR Br. 53-54 n.9). The House of Lords held that that particular statute should not be interpreted to require a showing of "balance of probabilities." In *R. v. Immigration Appeal Tribunal ex parte Jonah*, CO/860/84 (Q.B. Feb. 11, 1985), the Tribunal had determined that a fear of persecution was not "well founded," as required by an immigration rule, by applying "a balance of probabilities" approach (see LCHR Br. Addendum Doc. 4, at 1, 3). The court declined to reverse on the basis of *Fernandez*, holding that any difference between "well-founded fear" and "balance of probabilities" was "semantic" and that the Tribunal had not "fall[en] into error of law" (LCHR Br. Addendum Doc. 4, at 4).

United States itself, for the United States has been in the forefront among nations in resettling refugees and granting asylum under the "well-founded fear" standard.<sup>25</sup>

6. Finally, we note that much of the discussion in our opponents' briefs is devoted to points that have nothing to do with the issue in this case. The narrow question decided below, and presented in the petition, is one of statutory construction: whether the burden of proving eligibility for asylum under Section 208 is equivalent to the burden of proving eligibility for withholding of deportation under Section 243(h). The balance-of-interests approach discussed by the American Immigration Lawyers Association and the American Civil Liberties Union et al. (see also Resp. Br. 28 n.24; UNHCR Br. 24, 29 & n.56), usually applied under the Due Process Clause, has never been applied to the task of statutory interpretation, and, indeed, is fundamentally inconsistent with the search for congressional intent.<sup>26</sup> Furthermore, the purpose of this case is to determine whether the proper standard is the likelihood or clear probability standard, or instead the more amorphous standard that the Ninth Circuit has adopted and that immigration judges within that circuit are attempting to apply.<sup>27</sup> The purpose of

<sup>25</sup> Compare Bureau for Refugee Programs, U.S. Dep't of State, *World Refugee Report* 100-102 (Sept. 1986) (Table VI, showing 52,353 refugees and asylees accepted in all of Europe and Canada combined in 1984 and 61,012 in 1985), with *id.* at 102-103 (Table VII, showing 84,154 refugees and asylees accepted in United States in 1984 and 70,583 in 1985).

<sup>26</sup> In addition, if that approach were proper and compelled rejection of our position in this case, it would have compelled a different result in *Stevic* as well, for the interests that these amici would have the Court balance are identical in the two cases.

<sup>27</sup> Respondent makes much of the fact that those judges are attempting to follow the Ninth Circuit's holding that a well-founded fear of persecution is "slightly less than" a clear probability of persecution (*Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (1986)).



this case is not to describe the types of evidentiary showings that may satisfy the standard that is adopted, and therefore this is not the occasion to determine what effect the difficulty of obtaining evidence might have on application of either the Section 208 standard or the Section 243(h) standard (see LCHR Br. 14-30; UNHCR Br. 23-24; Resp. Br. 27).

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court for disposition under the standard that has been consistently applied by the Board of Immigration Appeals.

Respectfully submitted.

CHARLES FRIED

*Solicitor General*

RICHARD K. WILLARD

*Assistant Attorney General*

LAWRENCE G. WALLACE

*Deputy Solicitor General*

ROY T. ENGLERT, JR.

*Assistant to the Solicitor General*

LAURI STEVEN FILPPU

DAVID V. BERNAL

*Attorneys*

SEPTEMBER 1986

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But the fact that immigration judges are attempting in good faith to follow binding precedent does not make the Ninth Circuit's standard any less vague.

JUL 12 1986

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE,

*Petitioner,*

—v.—

LUZ MARINA CARDOZA-FONSECA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE  
THE LAWYERS COMMITTEE FOR HUMAN RIGHTS  
THE AMERICAN JEWISH COMMITTEE  
THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH  
INDIAN LAW RESOURCE CENTER  
GOVERNOR TONEY ANAYA**

ARTHUR C. HELTON\*  
36 West 44th Street  
New York, New York 10036  
(212) 921-2160

*Of Counsel:*

SAMUEL RABINOVE  
RICHARD T. FOLTIN  
RUTI G. TEITEL  
STEVEN M. FREEMAN  
RICHARD J. RUBIN

*Attorneys for Amici Curiae*

\*Counsel of Record

CLEARY, GOTTlieb, STEEN  
& HAMILTON  
RICHARD F. ZIEGLER  
LISA BRACHMAN  
RHONDA L. BRAUER  
MARTHA F. DAVIS  
MARC C. HANSEN  
MICHAEL M. HICKMAN  
JESSICA SPORN TAVAKOLI

*Attorneys for Amicus Curiae  
Lawyers Committee for  
Human Rights*

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## INTEREST OF AMICI

Amici Curiae, the Lawyers Committee for Human Rights, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the Indian Law Resource Center and Governor Toney Anaya, offer this brief in support of petitioner.

The Lawyers Committee for Human Rights ("LCHR") is a national legal resource center working in the areas of human rights, refugee and asylum law. In 1980, the Committee created a national asylum project to monitor proposed legislation and regulations in the refugee and asylum areas, litigate significant cases in these areas, and assist in providing legal representation for applicants for political asylum.



In the representation area, the LCHR's national asylum project uses volunteer lawyers to represent deserving asylum-seekers irrespective of their nationality. Aside from its program in New York City which provides assistance to over 150 individuals each year, including asylum applicants in detention, the LCHR project works nationally to encourage and support private bar involvement in the asylum area. Since 1982, this project has trained and provided practice materials to over 1,500 volunteer lawyers who represent indigent Haitian asylum applicants. See A. Helton, The Haitian Pro Bono Representation Effort, 12 Hum. Rts., Fall 1984, at 19. In recognition of the unique needs of asylum-seekers for

the effective assistance of counsel, and the interest of the private bar in meeting those needs, LCHR's asylum project is helping to organize and support volunteer lawyer programs to represent asylum applicants in Boston, New York, Miami, New Orleans, Houston and Los Angeles.

The American Jewish Committee, a national organization of approximately 50,000 members, is dedicated to the defense of the civil rights and religious liberties of American Jews. The Committee believes that it can best accomplish this goal by helping to preserve the human rights of all persons, regardless of race, religion or national origin. Since its founding in 1906, the Committee has maintained an abiding interest in the development

of generous immigration, refugee and asylum policies. Ever mindful of our inability during the 1930's to make our immigration laws more flexible and responsive in order to rescue people trapped in Europe when war broke out, many of whom later died in Hitler's death camps, the Committee is committed to the fundamental humanitarian principle that the United States should play a key role in providing, together with other free nations, a safe haven for the world's oppressed.

The Anti-Defamation League ("ADL") was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL is vi-

tally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion or ethnic origins.

Since its inception in 1913, the ADL has espoused a principle against discrimination: "to secure justice and fair treatment for all." To that end, ADL has intervened in numerous landmark cases, urging the unconstitutionality or illegality of racial practices, e.g., Brown v. Board of Education, 374 U.S. 483 (1954); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

In addition to the ADL's concern with combatting racial discrimination is its interest in assuring that immigration procedures adhere to basic standards of justice and fairness, including respect for due process and fundamental human rights, regardless of race, creed, ancestry or national origin. In support of these principles, the ADL recently filed as an amicus curiae in Jean v. Nelson, 105 S. Ct. 2992 (1985). These principles are again at issue in the present case.

The Indian Law Resource Center is a non-profit, charitable, legal and educational organization working to support the rights of American Indians. The Center is a non-governmental organization with consultative status in the United

Nations. The Center has worked on asylum and refugee policies and practices with international organizations such as the United Nations High Commissioner for Refugees, the International Committee of the Red Cross, and the Organization of American States' Inter-American Indian Institute. The Center's legal staff has also assisted Kanjobal Indians from Guatemala and Miskito Indians from Nicaragua who are seeking asylum in the United States.

An increasing part of the Center's program is devoted to work on behalf of Indians from Central and South America. In recent years, Indians from those regions have been victims of some of the most serious human rights abuses in the Americas.



As a result, several thousand Central American Indians are presently seeking refuge in the United States.

Indian asylum applicants are typically from remote rural areas and usually speak Indian languages. Very few are from the educated, urban sectors whose members are most able to provide clear documentation of the persecution from which they have fled. Accordingly, the Center supports efforts to establish reasonable legal standards which will provide Indian asylum applicants with a fair opportunity to establish their entitlement to protection.

On March 28, 1986, Toney Anaya, exercising the administrative powers available to him as the Governor of the State of New Mexico,

issued a proclamation declaring New Mexico to be a "State of Sanctuary." This decree is not a condonation of civil disobedience, but an exhortation to all, including the immigration authorities, that they must follow international and domestic refugee laws. This action followed passage by large margins in both houses of the New Mexico Legislature of memorials advocating changes in federal immigration policy towards Central Americans. Governor Anaya's proclamation made New Mexico the first state to join numerous American municipalities and other political subdivisions in declaring sanctuary.

Governor Anaya is an American of Spanish descent, whose forebears arrived in this land when

legal barriers to immigration were unknown. The federal standard for political asylum is of crucial to Governor Anaya because of New Mexico's location on the southern border, which thousands of Central American refugees cross to seek refuge in the United States. The interest of Toney Anaya as amicus curiae is to eliminate the need for the sanctuary movement by assuring that the administrative process whereby refugees seek asylum is a fair procedure where justice is meted out in accordance with national and international law.

The written consent of both parties to this case has been obtained for the filing of this brief.

#### SUMMARY OF ARGUMENT

The legislative history of the Refugee Act of 1980 indicates that Congress intended to adopt a generous standard for granting political asylum which would comport with the practical difficulties facing asylum applicants. Moreover, a liberal interpretation of the "well-founded fear of persecution" standard is compelled by the difficulties asylum-seekers typically face in obtaining evidence and developing a factual record sufficient to support their claims. (Part I). The laws and practice of other sovereign states party to the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees is not only relevant to this Court's interpretation of these

international agreements, but is also a useful and recognized guide in interpreting the United States domestic laws at issue in this case. (Part II.A). Finally, sovereign states other than the United States which are parties to the Convention and the Protocol apply a liberal standard in determining refugee status in their own countries in recognition of the difficulties inherent in proving asylum claims and the gravity and nature of the harm facing the applicants if the claims are wrongly denied. (Part II.B).

## ARGUMENT

On August 12, 1985, the United States Court of Appeals for the Ninth Circuit held that the "well-founded fear of persecution" standard is applicable to political asylum applications. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986). The Court of Appeals thus found that the Board of Immigration Appeals had erred by applying the clear probability standard of proof to Respondent's asylum application, and remanded the asylum claim for consideration under the proper legal standard. 767 F.2d at 1455.



I.

A Generous Standard of  
Proof is Justified  
in View of the  
Inherent Difficulties  
Asylum-Seekers Face  
in Showing a  
"Well-Founded Fear  
of Persecution."

A generous standard for establishing eligibility for asylum is warranted in view of the myriad obstacles asylum-seekers and their counsel face in developing a documentary record demonstrating a "well-founded fear of persecution" within the meaning of section 208(a) of the Refugee Act of 1980.<sup>1</sup> The

<sup>1</sup> Under § 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982) [hereinafter cited as the "Refugee Act"], an alien may be eligible for asylum if he or she meets the definition of "refugee" contained in § 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1982), which explicitly employs the "well-founded fear of persecution" standard.

clear intent of the Refugee Act was to address "the tragedy of countless men, women, and children forced to leave their homes . . . . [w]hether they be 'boat people' fleeing the upheavals in Indochina, refugees in Southern Africa fleeing racism or guerrilla war, or Soviet Jews and Eastern Europeans seeking the promise of Helsinki Accords . . . ."

125 Cong. Rec. 23,232 (1979) (statement of Sen. Kennedy). Congress was aware, when it declared that the purpose of liberalizing the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982), was "to respond to the urgent needs of persons subject to persecution in their homelands," Refugee Act of 1980, Pub. L. No. 96-12, 94 Stat. 102 (1980), that the vast majority of asylum applicants

would be from diverse cultures, without a command of the English language and without the opportunity or resources to gather documentary evidence of persecution.<sup>2</sup>

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<sup>2</sup> The Refugee Act was intended to liberalize the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982), and to establish an asylum policy which, for the first time, would "facilitat[e] the admission and resettlement of refugees." S. Rep. No. 256, 96th Cong., 1st Sess. 2 (1979). The Refugee Act sought to give "statutory meaning to our national commitment to human rights and humanitarian concerns not reflected in the Immigration and Nationality Act of 1952, as amended," S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979), and to "bring United States law into conformity with our international treaty obligations under the United Nations Protocol relating to the Status of Refugees, [19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (Jan. 31, 1967) (hereinafter cited as the "Protocol")] ratified in November 1968, and the United Nations Convention relating to the Status of Refugees [July 28, 1951, 189 U.N.T.S. (Footnote continued)]

Courts also have recognized that aliens fleeing persecution often are unable to gather documentary evidence to prove past persecution or threat of future persecution. See Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984). Indeed, many asylum applicants reach the United States physically and emotionally exhausted, with nothing more than the clothing they are wearing. See Jean v. Nelson, 711 F.2d 1455, 1507 (11th Cir. 1983),

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150 (hereinafter cited as the "Convention")) which is incorporated by reference into United States law through the Protocol." S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979).

aff'd en banc, 727 F.2d 957, aff'd, 105 S. Ct. 2992 (1985); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 474-510 (S.D. Fla.), appeal dismissed, 614 F.2d 92 (5th Cir. 1980), modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

The majority of asylum applicants can offer only their own testimony that there are specific, concrete reasons giving rise to their fear of persecution. Their persecutors are unlikely to accommodate them by providing documentary evidence of past or contemplated future persecution. Their counsel must, therefore, assemble evidence of general conditions in the country of origin to corroborate the asylum-seeker's testimony. Such evidence

is compiled by indigenous refugee groups in the United States and abroad, and by the United States Department of State, Amnesty International, United Nations High Commissioner for Refugees, Americas Watch Committee, Helsinki Watch Committee and others. Courts are receptive to this type of evidence. See, e.g., Haitian Refugee Center v. Smith, 676 F.2d 1023, 1042 (5th Cir. 1982) (indicating the relevance of evidence concerning general conditions); Civiletti, 503 F. Supp. at 475 ("No asylum claim can be examined without an understanding of the conditions in the applicant's homeland."); In re Exame, 18 I. & N. Dec. 303, 304-05 (BIA 1982) (immigration judge improperly excluded evidence including "various reports



by Amnesty International and the Lawyers Committee for International Human Rights, Country Reports on Human Rights Practices from the United States Department of State").

In addition to the problems of obtaining documents that support the applicant's claim, many asylum-seekers do not speak English and must communicate through interpreters, thus increasing the potential for misunderstanding as well as inhibiting the growth of trust between such applicants and their counsel. The courts have recognized the obstacles encountered by such applicants and their need for counsel to represent their interests. See Rios-Berrios v. INS, 776 F.2d 859, 862-63 (9th Cir. 1985). In Civiletti, 503 F. Supp.

at 486, the court noted the added difficulties in obtaining information from applicants when the interviewer has a totally dissimilar cultural background from the applicant. Even more alarming is the situation where the interpreter relays incorrect information. In Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984), the Second Circuit stated that if the asylum applicant had understood English, "he would have realized that his asylum application did not state his true claim." See also Jean v. Nelson, 711 F.2d at 1463 ("translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights"); Gonzales v. Zurbrick, 45 F.2d 934,

937 (6th Cir. 1930) (inadequate translation in deportation hearing).

Applicants also are frequently afraid to disclose sensitive information that could place them in jeopardy if they are returned home or that could jeopardize the safety of their families or friends who remain in the home country. The courts have recognized this obstacle. See Civiletti, 503 F. Supp. at 483 (noting that asylum-seekers might be "extremely cautious and suspicious" to protect themselves or others from reprisals in their homeland).

Asylum applicants who are able to corroborate their claims with independent documentary evidence are rare exceptions. A few cases drawn from the files of the

LCHR's asylum project illustrate the inordinate and unrealistic burden of documentary proof necessary to satisfy the standard of proof urged by the Appellant.<sup>3</sup> In one case, the applicant managed to flee with an extensive file documenting his activities to expose corruption at high levels in the government, which had resulted in his persecution by government officials. His activities had also received wide media coverage. In another, the applicant was a close relative of a prominent and widely published intellectual whose arrest and expulsion from Haiti received extensive media cov-

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<sup>3</sup> The applicants' names and other identifying data have been withheld to protect the individuals' privacy.

erage. In yet another, a prominent black South African applicant had received extensive press coverage in the United States and abroad as an outspoken critic of apartheid. Similarly, another applicant was prominent in the Salvadoran land reform program and was an outspoken critic of the violence, repression and corruption that occurred in the name of the program. He and the program received extensive media coverage following the murders of two American land reform consultants associated with the program.

In contrast to these prominent asylum-seekers, the boat people, South African refugees fleeing racism or guerrilla war, or the other countless men, women and children forced to flee their homes, are

without documentary evidence of specific past persecution or of the threat of future persecution. Their cases are no less compelling, however, than those extraordinary asylum applications for which documentation can be produced. For that reason, the "well-founded fear" standard requires only that the applicant's fear be genuine and reasonable under the circumstances. See Helton, Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation, 87 W. Va. L. Rev. 787, 800-808 (1985).

By adopting a generous standard of proof, the Ninth Circuit has rightfully acknowledged the practical difficulties faced by



asylum-seekers in obtaining documentary evidence independent of their own testimony. See Cardoza-Fonseca, 767 F.2d at 1453. Under the Ninth Circuit's approach, "if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to 'specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds' listed in section 208(a)." Id. (quoting Carvajal-Munoz, 743 F.2d at 574).

Even before Congress enacted section 208(a) of the Refugee Act, the Board of Immigration Appeals recognized that an applicant's "own testimony may be the best -- in

fact the only -- evidence available" and applied a generous standard of proof in asylum claims. In re Sihasale, 11 I. & N. Dec. 759, 762 (BIA 1966) (asylum sought under predecessor of 8 U.S.C. § 1158(a), providing for conditional entry). See also In re Ugricic, 14 I. & N. Dec. 384, 385-86 (BIA 1972) (credible testimony could satisfy the fear of persecution standard under the predecessor of 8 U.S.C. § 1158(a), conditional entry).

The Office of the United Nations High Commissioner for Refugees has specifically addressed the inherent difficulties refugees face in proving asylum claims and suggests a generous approach to reviewing such claims in its Handbook on Procedures and Criteria for Deter-

mining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 196, 197 (1979) (the "Handbook"). The Handbook stresses the subjective "fear" component of the standard, id. at paras. 37-41, 45, 52, and suggests a liberal standard for the objective "well-founded" component. Id. at paras. 42, 43, 196, 197. According to the Handbook:

196. . . . cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. . . . and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should,

unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.

Handbook, supra, at paras. 196, 197.<sup>4</sup> See also INS v. Stevic, 467

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<sup>4</sup> United States courts have viewed the Handbook as a valuable guide to the meaning of the Protocol. See Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.7 (9th Cir. 1984); Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), rev'd sub nom. INS v. Stevic, 467 U.S. 407 (1984); Hotel & Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502, 512 (D.D.C. 1984). The Board of Immigration Appeals also views the Handbook as a helpful guide in interpreting the Protocol. See In re Acosta, Int. Dec. No. 2986 (BIA Mar. 1, 1985); In re Frentescu, 18 I. & N. Dec. 244 (BIA 1982); In re Rodriguez-Palma, 17 I. & N. Dec. 465 (BIA 1980).

U.S. 407 (1984) (the Supreme Court distinguished the apparently more generous "well-founded fear of persecution" standard applicable in asylum cases from the seemingly more stringent "clear probability standard" applicable in withholding cases, id. at 425, 430, and suggested an asylum applicant need only show a "reasonable possibility," short of a probability, of persecution, id. at 425).

Prior to the enactment of the Refugee Act, Congress had noted its dissatisfaction with the failure of the Immigration and Naturalization Service to meet the United States' international obligation to grant asylum. See Admission of Refugees into the United States, II: Hearings Before the Subcomm. on

Immigration, Citizenship and International Law of the House Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. 15 (1978) (statement of Rep. Eilberg). See also Helton, Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation, 87 W. Va. L. Rev. 787, 795-98 (1985). The Court should affirm the Ninth Circuit's ruling rejecting the Immigration and Naturalization Service's most recent refusal to abide by the Refugee Act.

By declaring a generous standard of proof to be applicable in asylum cases, the inherent difficulties asylum-seekers face in demonstrating a "well-founded fear of persecution" will be ameliorated. A



generous standard for the examination of asylum claims will not only further the purpose and policy of the Refugee Act but will reflect "one of the oldest themes in America's history -- welcoming homeless refugees to our shores." S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979).

## II.

The Jurisprudence of  
Other Countries  
Reflects a Generous  
Standard of Proof  
in Asylum Cases.

A. Sovereign State Practice  
Should Guide The Court's  
Interpretation of the  
Proper Standard of Proof.

To determine the standard of proof required to show refugee status under the Refugee Act, this Court should look to the laws and jurisprudence of other sovereign states for guidance. The Refugee Act must be interpreted consistently with the Protocol and Convention and international practice is instructive on the proper interpretation of those agreements. Moreover, this Court has, on several occasions in the past, taken international practice into account in interpreting laws.

As discussed above in Part I, Congress specifically intended that the United States statutes dealing with refugees and asylum, such as the Refugee Act, be interpreted and applied in a manner consistent with the Protocol. In addition to the intention of Congress, general principles of statutory interpretation require that this Court look to the Protocol and Convention in interpreting the Refugee Act. For over a century and a half, this Court has embraced the principle that, whenever possible, a domestic statute should be construed consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritzen v. Larsen, 345 U.S. 571, 578-79 (1953); MacLeod v. United States, 229 U.S. 416, 434

(1913); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Restatement of Foreign Relations Law of the United States § 134 (Tent. Draft No. 6, 1985) [hereinafter cited as "Restatement"]].

As a duly signed and ratified international agreement, the Protocol constitutes a binding rule of international law. Vienna Convention of the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF 39/27, reprinted in 8 I.L.M. 679 (1969) [hereinafter cited as "Vienna Convention"]; Restatement § 321. Therefore, in construing the Refugee Act, this Court should seek to harmonize the Refugee Act with the meaning of the Protocol and Convention. To do otherwise would be to

thwart the long-standing principle of interpreting United States laws in accordance with international law.

In determining the proper meaning to be ascribed to the Protocol (and therefore the Refugee Act), this Court should look to the practice of other sovereign parties to those agreements. It is an established canon of treaty interpretation that the subsequent practice of parties to a treaty should be taken into account. Vienna Convention, art. 32(3)(b); Restatement § 325(2). See also Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); Day v. Trans World Airlines, 528 F.2d 31, 35-37 (2d Cir. 1975); Husserl v. Swiss Air Transport Co., 351 F. Supp 702, 707 n.6 (S.D.N.Y.

1972), aff'd, 485 F.2d 1240 (2d Cir. 1973). Subsequent practice constitutes strong evidence of what the goals and intentions of the parties were. Thus, in deciding how to interpret the Protocol and Convention, this Court should be guided by the interpretation given those agreements by other parties as evidenced by their laws and jurisprudence. In this regard, the practice of states with legal and political systems similiar to those of the United States is particularly persuasive.<sup>5</sup>

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<sup>5</sup> Even absent a specific treaty provision, the practice of other states is a useful guide in interpreting United States domestic laws. On several occasions, this Court has looked to the practice of other states for assistance in the interpretation of our own law. This approach  
(Footnote continued)



In the area of refugee and asylum law, this Court has the benefit of the exemplary principles established by the practice of several other states with legal and political systems closely akin to those of the United States. In interpreting our own law, which embodies this nation's international

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has been particularly prevalent in the context of human rights. See, e.g., Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (examining practice of European and British Commonwealth states in determining whether Constitution prohibited death penalty for accomplice liability in felony murders); Coker v. Georgia, 433 U.S. 584, 569 n.10 (1977) (noting practice of other states in determining whether death penalty was unconstitutional punishment for rape); Trop v. Dulles, 346 U.S. 86, 102-103 (1958) (looking to practice of "civilized nations of the world" in determining whether denationalization was unconstitutional punishment).

treaty obligations, this Court should give great weight to the lesson offered by these other states.

B. Other Sovereign State Parties to the 1951 United Nations Convention relating to the Status of Refugees and the 1967 United Nations Protocol relating to the Status of Refugees Have Recognized the Need for a Liberal Standard of Proof.

In view of the inherent difficulties faced by asylum-seekers and the nature of the rights involved, other sovereign state parties to the Convention and the Protocol have recognized the need for a generous standard of proof in determining refugee status. A discussion

of relevant jurisprudence from these countries follows.<sup>6</sup>

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<sup>6</sup> Much of this jurisprudence was collected in connection with a meeting of North American and European asylum practitioners held under the auspices of the European Consultation on Refugees and Exiles in New York in May 1986. See "Liberal Trend on Political Asylum Discerned by Lawyers' Gathering," N.Y. Times, May 11, 1986, § 1, at 28. Canada and the United Kingdom were chosen for this discussion based on the similarity of their legal systems to that of the United States. The other countries discussed herein, France and the Netherlands, are those with a long history under the Convention and Protocol for which materials and translations were available. For the convenience of the Court, the foreign materials that are not readily available in law libraries have been assembled in an Addendum and lodged with the Clerk of the Court.

1. Canada. The Convention's definition of refugee status is incorporated into Canadian law in the Immigration Act of 1976 § 2 (hereinafter cited as the "Act"). Both to fulfill its obligations under the Convention as incorporated into domestic law and to assure protection of asylum applicants' fundamental constitutional rights, Canada has adopted generous procedural and substantive rules to effect a liberal interpretation of the Convention's definition of refugee.

The procedural rights of aliens seeking asylum in Canada have been clearly articulated and vigilantly enforced by Canadian courts. For example, the rules of evidence adopted by the Federal Court of Appeal provide that the Board of

Immigration Appeals (the "Board") must consider all of the evidence presented by the applicants, regardless of when the events occurred, Oyarzo v. Minister of Employment and Immigration, 2 Federal Court Reporter [F.C.] 779 (Can. F.C.A. 1982) (minimal political involvement many years earlier must be considered in evaluating foundation for present fear), and including evidence which would otherwise be hearsay. Re Saddo and Immigration Appeal Board, 126 D.L.R.3d 764 (Can. F.C.A. 1981) (newspaper articles submitted by applicant must be considered). Applicants must have an opportunity to respond to evidence which the Board relies on from its own knowledge. Permaul v. Minister of Employment and Immigration, 53 National Re-

porter [N.R.] 323 (Can. F.C.A. 1983); Galindo v. Minister of Employment and Immigration, 2 F.C. 781 (Can. F.C.A. 1981). Most significantly, the sworn testimony of an applicant carries a presumption of validity in the absence of evidence to doubt his credibility. Maldonado v. Minister of Employment and Immigration, 31 N.R. 34 (Can. F.C.A. 1979) (where applicant under oath alleged fear for his safety in Chile, the Board could not infer from the fact that he had returned to Chile from Argentina before seeking asylum in Canada that his allegations were not credible); Permaul, 53 N.R. at 324 (Board could not contradict applicant's sworn testimony based on its knowledge of conditions in Guyana). These rules



demonstrate that Canadian courts recognize the difficulty asylum applicants face in establishing their claims.

A recent decision of major importance, strengthening the procedural rights of asylum-seekers, is Singh v. Minister of Employment and Immigration, 58 N.R. 1 (Can. 1985), in which the Supreme Court of Canada invalidated certain appellate procedures of the Act to the extent that they conflicted with constitutional principles of procedural fairness. Id. at 74. At issue was Section 71 of the Act, which provides for redetermination of the Minister's asylum decision. The 1982 Supreme Court decision in Kwiatkowsky v. Minister of Manpower and Immigration, 45 N.R. 116 (Can. 1982), had adopted a harsh

construction of Section 71 of the Act, requiring the Board to provide a hearing for redetermination of refugee status only if it found that the applicant was more likely than not to establish refugee status. This deprived many applicants of the opportunity to reinforce their claim with oral argument.<sup>7</sup>

Striking down this restrictive screening process for hearings under Section 71, the Singh court initially determined that aliens applying for asylum are protected by Canada's constitutional law and basic principles of funda-

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<sup>7</sup> Section 45 of the Act provides for initial refugee determinations by the Minister of Employment and Immigration and does not require that the Minister hold hearings. Immigration Act 1976 § 45.

mental fairness. The court then applied these principles in the asylum context, noting that "[t]he most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal right at issue and the severity of the consequences to the individuals concerned." Singh, 58 N.R. at 14. Based on the importance of the rights and the potential severity of the consequences in asylum cases, the court concluded that Canada's constitutional law requires an oral hearing at some point in the asylum process.

The substantive standards under Canadian immigration law are similarly generous to asylum applicants. In Kwiatkowsky, the Supreme

Court defined a well-founded fear of persecution to require a subjective fear, which would be evaluated on the basis of objective evidence "to determine if there is a [reasonable] foundation for it." Kwiatkowsky, 45 N.R. at 122. The Federal Court of Appeal, in Arduengo v. Minister of Employment and Immigration, 40 N.R. 436 (Can. F.C.A. 1981), clarified that a well-founded fear of persecution does not require the applicant to show that he would be subject to persecution. The same court, in Rajudeen v. Minister of Employment and Immigration, 55 N.R. 129 (Can. F.C.A. 1984), applied a similar test to that in Kwiatkowsky, requiring no more than a "valid basis" for an applicant's subjective fear. Id. at 134. Finally, in determining

whether the basis for a fear of persecution is valid, the Board is required to view the applicant's activities as the feared government would, and not as the Board or the Canadian Government would.

Astudillo v. Minister of Employment and Immigration, 31 N.R. 121 (Can. F.C.A. 1979) (membership in a sports club viewed by Chilean government as political).

The Canadian interpretation of the Convention's well-founded fear standard is thus far more generous to asylum applicants than a clear probability, or even a balance of probabilities standard.

## 2. The United Kingdom.

The United Kingdom has also incorporated the Convention's "well-founded fear of persecution" standard into its laws regarding political asylum and the determination of refugee status. Statement of Changes in Immigration Rules, House of Commons Papers No. 169, para. 134 (1983) (the "Immigration Rules").<sup>\*</sup> Notwithstanding the narrow scope of judicial review of administrative

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<sup>\*</sup> As a procedural matter, British immigration officials are required to refer asylum applicants to the Secretary of State for the Home Office (the "Secretary"). Statement of Changes in Immigration Rules, House of Commons Papers No. 169, para. 73. The Secretary determines the refugee status of the applicants, subject to review by the Immigration Appeal Tribunal (the "Tribunal"). Decisions by the Tribunal are subject to review by the appellate courts.



decisions available in the United Kingdom, see Ex parte Bugdaycay, [1986] 1 W.L.R. 155 (C.A.), the appellate courts have adopted a generous interpretation of the Convention definition of political refugees and the well-founded fear standard.

In Woldu v. Secretary of State for the Home Department, Immigration Appeal Tribunal No. TH/93591/82 (2705), slip op., (1983), the Tribunal considered the application of an Ethiopian woman who, because of her membership in the Eritrean minority, was vulnerable to arbitrary arrest and persecution during Ethiopia's civil war. In granting her claim of refugee status, the Tribunal held that "for a fear of persecution to be

well-founded, there must be a reasonably grounded expectation of persecution [which] must be higher than a mere remote possibility, but need not be higher than a probability, of persecution." Id. at 4 (emphasis added). The Tribunal then found that applicant's well-founded fear was established by the applicant's family connections with Eritrea, and the existing circumstances in Ethiopia, which would put her "at risk of arbitrary treatment" if she returned. Id. at 4-5.

Decisions of the Queen's Bench Division support the Tribunal's liberal interpretation of the well-founded fear standard. In Ex parte Jeyakumaran, CO/290/84 (Q.B. 1985) (available July 1, 1986, on LEXIS, Enggen library, Cases

file), where a member of the Tamil minority in Sri Lanka sought asylum, the Queen's Bench Division stated that the Immigration Rules require a two-tiered analysis: "subjectively, whether [the applicant] had a fear of the kind specified; and, objectively, whether it was well-founded." Id. The court recognized "the administrative problem of numbers seeking asylum," but refused "to adopt artificial and inhuman criteria in an attempt to solve it." Id. This Court should also reject such an attempt by the United States' administrative authorities to elevate the applicable standard of proof.

In Ex parte Jonah,  
CO/860/84 (Q.B. 1985) (available  
July 1, 1986, on LEXIS, Eggen li-

brary, Cases file), a former union leader from Ghana who had been forced to go into hiding in a remote village sought asylum. The Queen's Bench Division noted the distinction between proving a likelihood of persecution and proving that the applicant would be persecuted on the balance of probabilities. Citing Fernandez v. Government of Singapore, [1971] 1 W.L.R. 987 (H.L.),<sup>9</sup>

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<sup>9</sup> In Fernandez, the House of Lords interpreted language in the Fugitive Offenders Act of 1967 similar to the well-founded fear standard to require a lesser degree of likelihood than a balance of probabilities test would imply. The Fugitive Offenders Act § 4(1) states that "A person shall not be returned . . . if it appears to the Secretary . . . that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race,"  
(Footnote continued)

the court pointed out the inappropriateness of the latter standard when a court is required to predict future events such as what would happen to an asylum applicant upon return to his or her home country.<sup>10</sup>

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religion, nationality or political opinions." The House of Lords placed great emphasis on the gravity of the harm likely to befall the applicant if the Secretary ruled erroneously against him. Recognizing the similarity of both the language and the nature and gravity of harm involved (*i.e.*, loss of liberty) in the two cases, the Queen's Bench Division in *Jonah*, CO/860/84 (Q.B. 1985), relied on *Fernandez* to support its adoption of the more liberal test.

<sup>10</sup> The Queen's Bench in *Jonah*, CO/860/84 (Q.B. 1985), also set forth a more expansive definition of persecution than had the adjudicator below. Despite finding that the applicant, upon denial of refugee status, would be forced to live in a remote village of his country, separated from his wife and  
(Footnote continued)

A clear probability standard would be similarly inappropriate, as it would require courts to predict whether applicants would be subject to persecution, rather than evaluate their present fears.

3. France. The liberal construction of the Convention terms is not limited to state parties which adhere to Anglo-American legal traditions. In France,<sup>11</sup> for exam-

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unable to continue in his occupation of 30 years, the adjudicator nevertheless held that the applicant was not facing persecution. The Queen's Bench applied what the court termed an "ordinary" meaning of persecution, *i.e.*, "injurious action and oppression", and found that the applicant's situation was consistent with persecution in that expanded sense. *Id.*

<sup>11</sup> France recognizes as a refugee any person who falls within the mandate of the United Nations High Commissioner for Refugees  
(Footnote continued)



ple, the office for the Protection of Refugees and Stateless Persons ("OFPRA") recognizes as refugees those who show that they fear persecution and that such fear is reasonable.<sup>12</sup> The Commission des Recours,

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or within Article 1 of the Convention. Law No. 52-893 of July 25, 1952, Article 2, Journal Officiel, July 27, 1952, 7642 (France). In addition, France has enacted the Protocol as domestic law. Decree No. 71-289 of Apr. 9, 1971, Journal Officiel, Apr. 18, 1971, 3752 (France). The discussion of French statute and case law herein is based on the excerpts of decisions appearing in F. Tiberghien, La Protection des Refugies en France (1984) (hereinafter cited as "Tiberghien").

<sup>12</sup> France's Minister of External Relations explained OFPRA's interpretation of the Convention's refugee definition as follows:

"... OFPRA evaluates an applicant's fear of persecution and bases its decision (Footnote continued)

the administrative tribunal which reviews the determinations of the OFPRA, has found that the grant of refugee status does not require actual proof of threatened persecu-

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sion upon an examination of the situation in the asylum applicant's country of citizenship, its laws and their application, as well as upon principles enunciated in the various international agreements concerning the rights of man. Refugee status is based in each individual case upon a consideration of all the elements and all the circumstances which may shed light on a given situation and establish the credibility of the applicant's statements as received by the office.  
... "

Reply of the Minister of External Relations to a Parliamentary Question, No. 27217, Journal Officiel - Assemblée Nationale, June 9, 1980, 2342, cited in 26 Annuaire Francais de Droit International 954-55 (1980) (unofficial translation).

tion, but that the Commission des Recours may take notice of the general conditions in the country of origin, or other facts that are relevant to the determination of refugee status, to show a likelihood of persecution. Tiberghien, supra, at 194 (discussing Lopez Martinez, Comm. Rec. 530, Jan. 13, 1955).<sup>13</sup>

The decisions of the administering authorities and the appellate bodies in France are not based on the probability of persecution, but rather on a plausible account for fear of persecution.

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<sup>13</sup> The Commission des Recours has also adopted a liberal interpretation of the term "persecution." See Weisner, Comm.Rec. 9,129, Nov. 24, 1977, reprinted in part in Tiberghien, supra, at 130 (clearly disproportionate criminal sanctions may be considered persecution).

Thus, in Hassam, Comm.Rec. 12,529, Apr. 23, 1981, discussed in Tiberghien, supra, at 194, the Commission held that an applicant who alleged, but did not substantiate, threats of persecution, had a "plausible reason" for a well-founded fear of persecution because of the then-occurring regional conflicts and his ethnic origins. Likewise, in Kouhem Helaleh, Comm.Rec. 14,243, June 7, 1982, discussed in Tiberghien, supra, at 194, the Commission found that, in view of the political regime in the country to which the applicant would be deported, the applicant, who had never resided in that country, could fear persecution solely on account of his Jewish faith. This generous standard of plausibility is more consis-

tent with the Convention's refugee definition than is a clear probability standard.

4. The Netherlands. In the Netherlands, reviewing courts do not hesitate to overturn decisions by the State Secretary on the question of refugee status<sup>14</sup> based on the liberal standard of plausibility and in consideration of the difficulties inherent in proving asylum

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<sup>14</sup> Although the State Secretary has substantial discretion in granting asylum where another safe country has evidenced some willingness to accept the applicant, Judgment of Oct. 1, 1980, Judicial Division of the Council of State, Neth., Nos. A-2.137-A & B, the higher courts in the Netherlands have granted refugee status liberally regardless of the State Secretary's determinations below.

cases.<sup>15</sup> For example, the Judicial Division of the Council of State (the "Division") has held that a protest singer from Uruguay had a well-founded fear of persecution, Judgment of July 12, 1978, Judicial Division of the Council of State, Neth., No. A-20107, and that a Mexican national validly feared persecution when Mexican authorities had taken action against demonstrations and peaceful political activity in which the applicant was involved. Judgment of Oct. 1, 1980, Judicial

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<sup>15</sup> See Judgment of Feb. 21, 1983, Judicial Division of the Council of State, Neth., Nos. A-2.0071-A & B (applicant must establish that persecution is plausible); Judgment of Jan. 14, 1982, Judicial Division of the Council of State, Neth., Nos. A-2.1795-A & B (facts must be established with sufficient plausibility).



Division of the Council of State, Neth., Nos. A-2.137-A & B. In two other cases, the Division found that a South African who was subject to apartheid and who had participated in some political activities was entitled to refugee status, Judgment of Apr. 6, 1981, Judicial Division of the Council of State, Neth., No. A-2.0932, and that a Hungarian national with knowledge of state secrets was likely to be subject to a disproportionately heavy sentence for leaving Hungary and was, therefore, entitled to asylum. Judgment of Feb. 21, 1983, Judicial Division of the Council of State, Neth., Nos. A-2.0071-A & B.

The Division presented an expansive view of persecution when it overturned the State Secretary's

denial of refugee status to an Argentinian who had been banned from practicing his religion, holding that "there is no evidence that the Divine Light Mission is proscribed in Argentina for reasons which are acceptable by international standards." Judgment of Sept. 30, 1982, Judicial Division of the Council of State, Neth., Nos. A-2.1234-A & B. In another case, the Division found that persecution for membership in a particular social group can include discrimination based on sexual disposition, but noted that such discrimination must "limit [the applicant's] means of subsistence to such an extent as to justify the term 'persecution.'" Judgment of Aug. 13, 1981, Judicial Division of the

Council of State, Neth., No. A-  
2.1113.

5. Summary. Canada, the United Kingdom, France and the Netherlands all evidence similar approaches to the determination of refugee status under the Convention. All four countries have recognized the necessity for a generous standard of proof because of the difficulties inherent in proving claims for asylum and the gravity and nature of the harm facing the applicants if their claims are wrongly determined. These considerations should also direct this Court to adopt a liberal construction of the Protocol and Convention, in consonance with the interpretations of other state parties.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: New York, New York  
July 14, 1986

Respectfully submitted,

Arthur C. Helton <sup>16</sup>	Cleary, Gottlieb,
36 West 44th St.	Steen & Hamilton <sup>17</sup>
New York, N.Y.	Richard F. Ziegler
10036	Lisa Brachman
(212) 921-2160	Rhonda L. Brauer
	Martha F. Davis
<u>Of Counsel:</u>	Marc C. Hansen
Richard T. Foltin	Michael M. Hickman
Samuel Rabinove	Jessica Sporn Tavakoli
Steven Freeman	
Ruti G. Teitel	<u>Attorneys for Amicus</u>
Richard J. Rubin	<u>Curiae Lawyers</u>
	Committee for
	for Human Rights

Attorneys for  
Amici Curiae

---

<sup>16</sup> Counsel of Record.

<sup>17</sup> Counsel wish to acknowledge the assistance of Jason Abrams, Susan Gelmis, Candace Reid and Patrick Dillon-Malone, law clerks, in the preparation of this brief.

JUL 14 1986

JOSEPH F. SPANIO, JR.  
CLERK

(6)  
No. 85-782

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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IMMIGRATION AND NATURALIZATION SERVICE,  
*Petitioner,*

v.

LUZ MARINA CARDOZA FONSECA,  
*Respondent.*

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On Writ of Certiorari to  
the United States Court of Appeals  
for the Ninth Circuit

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BRIEF OF AMICI CURIAE  
THE INTERNATIONAL HUMAN RIGHTS LAW GROUP  
AND THE WASHINGTON LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW  
IN SUPPORT OF RESPONDENT

---

E. EDWARD BRUCE\*  
CAROL FORTINE  
CARLOS M. VAZQUEZ  
COVINGTON & BURLING  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 7566  
Washington, D.C. 20044  
(202) 662-6000

\**Counsel of Record*

July 14, 1986

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New York Times, April 17, 1986,  
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**INTEREST OF AMICI CURIAE<sup>1/</sup>**

The International Human Rights Law Group ("the Law Group") is a non-profit organization incorporated in 1983 in the District of Columbia that seeks to promote the observance of international human rights by providing pro bono legal assistance and information, representing clients before international fora, and participating as amicus curiae in litigation. The Law Group represents the National Council of Churches in cases currently pending before the Inter-American Commission on Human Rights concerning the treatment of Haitian and Salvadoran refugees.

The Washington Lawyers' Committee for Civil Rights Under Law is the Washington,

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<sup>1/</sup> Petitioner and respondent have given their written consent to the filing of this brief.



D.C., affiliate of the Lawyers' Committee for Civil Rights Under Law. That Committee was organized in 1963, at the request of President Kennedy, to involve private attorneys in the national effort to assure equal rights for all members of society. The national and Washington Lawyers' Committees have long provided volunteer legal representation to individuals claiming unlawful discrimination and other invasions of civil rights. In 1978, the Washington Lawyers' Committee established an Alien Rights Project to represent noncitizens who fear persecution if returned to their homelands.

Amici curiae offer this brief primarily to focus upon the legislative history of relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq. ("INA"), as amended by the Refugee Act of 1980.

STATEMENT OF THE CASE

Background. This case requires the Court to determine whether persons who believe for good reasons that they would be persecuted in their native lands are "refugees" within the meaning of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (hereinafter "INA"), and thus are eligible to apply for entry into the United States or, if already here, to seek asylum or permanent resident status.

Section 101(a)(42) of the INA defines "refugees" as all aliens who are "unwilling" to return to their native countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). This definition of "refugee" was added to the INA by the

Refugee Act of 1980, P.L. 96-212, 94 Stat. 103, to ensure that U.S. immigration statutes reflect our treaty commitments and domestic policy to "welcom[e] the oppressed of other nations."<sup>2/</sup>

For the same reasons, the term "refugee" was incorporated into three new sections of the INA added in 1980: Section 207, 8 U.S.C. § 1157, which permits the Attorney General to admit refugees into the United States; Section 208, 8 U.S.C. § 1158, which gives him the discretion to grant asylum to refugees already in the United States or at its borders; and Section 209, 8 U.S.C. § 1159, which allows him to adjust the status of

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<sup>2/</sup> See *INS v. Stevic*, 467 U.S. 407, 426 n.20 (1984), (quoting H.R. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979)).



refugees granted asylum under Section 208 to permanent residents.

Proceedings Below. This case began with the request by Luz Marina Cardoza Fonseca for asylum pursuant to Section 208 of the INA. Ms. Cardoza Fonseca testified in proceedings before the Immigration and Naturalization Service ("INS" or "Service") that she holds political opinions opposed to the Sandinista regime in Nicaragua and that she believes her opinions are known to that regime because of her relationship to her brother. Respondent's brother had renounced his affiliation with the Sandinista movement and had publicly criticized its progression towards communism before coming to the United States and applying for asylum. Respondent testified that she fears the Sandinistas will now persecute her to retaliate against her brother or to

extract information which the Sandinistas believe he may have told her. Respondent further testified that her sister, who continues to live in Nicaragua, has advised her that it is too dangerous for respondent to return to that country.

The INS rejected respondent's testimony as insufficient. It took the position that, in order to have a "well-founded fear" of persecution and thus to qualify as a "refugee" who can seek asylum under Section 208, respondent must show a "clear probability" of persecution -- i.e., that it is more likely than not that she would be persecuted in Nicaragua.

The Service did not extract this "clear probability" standard either from Section 101's definition of "refugee" or from Section 208. Instead, it relied on cases decided under Section 243(h) of the Act, 8 U.S.C. § 1253(h). That provision

does not apply to "refugees," but instead bars the deportation of "aliens" to countries where their "li[ves] or freedom would be threatened."

The Ninth Circuit reversed.

Cardoza Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986). In accordance with its earlier holding in Bolaños Hernández v. INS, 767 F.2d 1277 (9th Cir. 1985), and those of other circuits,<sup>3/</sup> the court held that aliens' fears of persecution are "well-founded" if they have "good reason" to fear persecution, even if they cannot show a probability of persecution. The court

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<sup>3/</sup> Carvajal Muñoz v. INS, 743 F.2d 562 (7th Cir. 1984); Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986). See also Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984). Only the Third Circuit has sustained the position advocated by the INS here. Sankar v. INS, 757 F.2d 532 (3d Cir. 1985).



held that the plain meaning of the term "refugee" as someone with a "well-founded fear of persecution" requires "that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded." 767 F.2d at 1453.<sup>4/</sup>

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<sup>4/</sup> The INS District Director in Florida recently announced, with the apparent approval of the Department of Justice, that aliens fleeing Nicaragua would no longer have the burden of demonstrating that they would be persecuted; instead, the Service would have to prove that they would not be persecuted. See New York Times, April 17, 1986, page 1, column 1. In addition, the Department of Justice is reportedly drafting regulations that would impose the same burden on the INS for aliens claiming that they are fleeing other communist countries. See id. This apparent change in the Service's enforcement policy seems to be inconsistent with the INS's construction of the Act in this case and raises the question whether the writ should be dismissed as improvidently granted.

# SUMMARY OF ARGUMENT

I. The Service's position that aliens seeking to establish "refugee" status by proving a "well-founded fear" of persecution must show that they are, in fact, likely to be persecuted in their homeland ignores the plain meaning of the terms of the INA and is based on a provision of the Act that does not use the terms "refugee" or "well-founded fear." This Court should not defer to such a construction of the Act, since it is based upon the INS's continued adherence to a position which predates the 1980 amendments to the Act and thus represents an unwillingness to change that position, rather than a contemporaneous construction of the statute. Moreover, the Service ignores the fact that its restrictive definition of "refugee" will reduce the number of aliens eligible for admission into the

United States as refugees. Finally, the INS's argument that a narrow interpretation of "refugee" and consequent restriction of asylum are necessary to avoid making redundant the Act's withholding-of-deportation remedy ignores the fact that the asylum remedy is discretionary whereas withholding of deportation is mandatory.

II. The legislative history of the 1980 amendments to the INA shows that Congress intended that the standard for establishing "refugee" status would be more generous than the one the Service proposes: (A) Congress did not intend to narrow the prior standard for establishing refugee status, which had consistently been interpreted to require only a showing of "good reason" or a "reasonable basis" for fearing persecution. (B) Congress intended to enhance the Attorney General's flexibility in addressing world refugee



problems, whereas the Service's proposed standard would narrow the class of aliens who could qualify as refugees. (C) Congress intended that the term "refugee" be interpreted in conformity with the United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 ("U.N. Convention"); the negotiating history of the Convention establishes that a "refugee" is an alien with "good reason" or "reasonable grounds" for fearing persecution.

III. The Service's legislative history argument is misconceived: (A) Its contention that it is "inconceivable" that Congress could have intended a different standard for asylum than the one set forth in the INS's prior regulations ignores the fact that Congress mandated the "well-founded fear" test that the Service had previously rejected. (B) The Service's argument that

Congress ratified the prior asylum standard by virtue of its references to the prior regulations or to the term "asylum" plays upon the ambiguity of that term and ignores the fact that the term was frequently used as a synonym for refugee admissions or for adjustment of status, both of which had been more generously granted than "asylum" as defined in the prior regulations.

(C) The Service's argument that Congress ratified prior judicial and administrative constructions of the "well-founded fear" standard as the equivalent of the "clear probability" standard is without merit because there was no consensus prior to 1980 that the two standards were equivalent.

#### ARGUMENT

##### I. THE PLAIN MEANING AND THE STRUCTURE OF THE INA CONTRADICT THE SERVICE'S POSITION.

"The starting point in every case involving construction of a statute is the language itself." Landreth Timber

Co. v. Landreth, 105 S. Ct. 2297, 2301-02 (1985).<sup>5/</sup> Thus, this Court has "no choice

but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'"

Metropolitan Life Insurance Co. v. Massachusetts, 105 S. Ct. 2380, 2389 (1985).

The Service ignores these principles. It takes the position that the "well-founded fear of persecution" test embodied in the definition of "refugee" in Section 101(a)(42) of the INA and used in Sections 207-09 should be interpreted in precisely the same fashion as the quite different test of Section 243(h),

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<sup>5/</sup> See also United States v. James, 54 U.S.L.W. 5030, 5032-33, 5035 (U.S. July 2, 1986); Bowsher v. Merck & Co., 460 U.S. 824, 830 (1983); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982).



which requires aliens to prove that their "li[ves] or freedom would be threatened" if deported.

Understandably unwilling to argue that its reading of the statute can be sustained by the plain meaning of its terms, the INS instead argues that the Court should defer to the agency's construction (Petr. Br. 9-11); that Congress could not have intended to permit aliens to qualify as "refugees" under Section 101(a)(42), and thus to be eligible to apply for asylum under Section 208, if they are not also eligible for withholding-of-deportation under Section 243(h) (id. at 11-28); and that the use of a standard to grant asylum under Sections 101(a)(42) and 208 which differs from the standard used in Section 243(h) "would be administratively unworkable" (id. at 28-32).

Since the bulk of the Service's argument is devoted to an attempt to discern the intent of Congress on this issue, amici's brief will be directed to the legislative history of the statute and will show that, in equating the standard for withholding deportation under Section 243(h) with the standard for asylum under Sections 101(a)(42) and 208, the Service has misread Congress' intention. Before turning to the legislative history, however, we make the following points which we assume will be developed at greater length by respondent and by other amici supporting her.

A. The issue in this case is the definition of the term "refugee" set forth in Section 101(a)(42) of the Act and incorporated into Sections 207-209. Congress unmistakably indicated that it was not necessary for aliens to show that

they would actually be persecuted, since "refugee" was defined as including all aliens who are "unwilling to return . . . because of persecution or a well-founded fear of persecution. . . ." 8 U.S.C. § 1101(a)(42) (emphasis added). Obviously, Congress contemplated that aliens could qualify for "refugee" status by producing evidence either that they would be persecuted or that they had a "well-founded fear" of persecution.

Aliens invoking this latter alternative can offer evidence bearing upon their state of mind -- i.e., that they in fact have a "fear of persecution" -- as well as some objective evidence to show that their fear is "well-founded."<sup>6/</sup>

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<sup>6/</sup> As the Ninth Circuit recognized, to be "well-founded" there must be "good reason" for



Unlike those seeking to satisfy the "persecution" test, however, they would not be required to prove that they would, in fact, be persecuted abroad.

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(Footnote Continued)

fearing persecution. 767 F.2d at 1453. Since that court properly declined to apply the "well-founded fear" standard to respondent's claims before the Board itself had performed that task, 767 F.2d at 1455, it is not necessary now to define more precisely the test which the Service should use in determining whether a refugee's fear of persecution is "well-founded."

We do, however, note the error of the test the Board enunciated in *In re Acosta-Solorzano*, Int. Dec. No. 2986 (B.I.A. March 1, 1985). Among the errors made by the Board in that case was its holding that, to qualify as a refugee seeking asylum under Section 208, aliens must "as a practical matter" show, *inter alia*, that "the persecutor is already aware, or could easily become aware" of their beliefs. (*See* Petr. Br. 30). Certainly, aliens can have "well-founded" fears of persecution, if they possess the beliefs or characteristics that would subject them to persecution abroad, even if they cannot presently demonstrate that the persecutor either is or could easily become aware of their beliefs or characteristics. For example, a Jew facing deportation to Nazi Germany prior to World War II would have had a "well-founded fear of persecution" even if his religious heritage might not have been easily discovered.

Section 243(h) of the Act is quite different. It provides that an alien shall not be returned to a country "if the Attorney General determines that such alien's life or freedom would be threatened" (emphasis added). Under Section 243(h), the alien's state of mind is entirely irrelevant. As this Court held in INS v. Stevic, 467 U.S. 407 (1984), the test under that section is whether there is a "clear probability" of persecution abroad. Indeed, Stevic rejected the argument that an alien could qualify for an order barring deportation merely by showing a "well-founded fear" of persecution. 467 U.S. at 428.

While the application of a "clear probability" standard to establish "refugee" status might have been appropriate if Congress had insisted that an alien's unwillingness to return be based upon the

fact of persecution, it is clearly inconsistent with the "well-founded fear of persecution" alternative: A "fear" of persecution cannot properly be equated with the "fact" of persecution; a fear can be "well-founded" even if it is not probable that the fear will be realized.<sup>7/</sup>

B. While this Court has frequently stated that deference should be paid to administrative construction of statutes,

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<sup>7/</sup> Throughout its brief, the Service mischaracterizes the issue in this case as involving a "burden-of-proof" question. (Petr. Br. 8, 10, 19, 28). This case has nothing to do with the burden of proof. We assume that an alien seeking asylum under Section 208 has the same preponderance-of-the-evidence burden that an alien would have in a Section 243(h) proceeding. The issue here, however, is the legal standard which aliens must satisfy in marshalling evidence under Sections 101(a)(42) and 208 to show that they have a "well-founded fear of persecution." The fact that aliens must show by a preponderance of the evidence that they have such a fear by no means indicates, as the Service seemingly suggests, that they must show that it is more likely than not that they would be persecuted abroad.



it has not allowed agencies to disregard the clear language or intent of Congress. As this Court recently held, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Board of Governors v. Dimension Financial Corp., 106 S. Ct. 681, 686 (1986). "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

Prior to the 1980 amendments to the INA, the Service had adopted a

restrictive view of asylum.<sup>8/</sup> Those amendments modified the definition of "refugee" and added Section 208 to provide for the first time a specific statutory basis for asylum. However, the Service has continued to insist upon its prior narrow view of asylum.

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<sup>8/</sup> The INS's 1979 regulations required aliens seeking asylum to sustain "the burden of satisfying the Immigration Judge that [they] would be subject to persecution. . . ." 44 Fed. Reg. 21,253, 21,258 (April 10, 1979). In so refusing to incorporate the "well-founded fear" standard into its asylum regulations, the INS offered its "opinion" that the only difference between its "would be persecuted" standard and the "well-founded fear" standard was one of "semantics." *Id.* at 21,257. To back up that "opinion" the Service noted that "a fear which is illusory, neurotic or paranoid, however sincere, does not meet the requirement that the fear of persecution be well-founded," and observed that satisfaction of the "well-founded fear" standard therefore required the alien to "show good reason why he fears persecution." *Id.* The Service never explained its conclusion that a "well-founded fear" -- which it admitted could be established by proof of a "good reason" for the fear -- could be viewed as the semantic equivalent of "would be persecuted."

Thus, this Court is not presented with an agency's fresh interpretation of a new and unclear directive of Congress to which it might properly defer. See Udall v. Tallman, 380 U.S. 1, 16 (1965).

Instead, this case involves the recalcitrance of an agency that refuses to submit to Congress' resolution of an issue when it conflicts with the agency's prior practice.

C. The Service focuses its analysis solely on the INA's asylum provision, Section 208, and its relationship to the withholding-of-deportation provision, Section 243(h). It ignores the fact that the "well-founded fear" test of Section 101(a)(42) also applies to refugee admissions under Section 207, see Stevic, 467 U.S. at 423 n.18, and adjustment of refugee status under Section 209. Moreover, as this Court noted in Stevic, 467 U.S. at



425, and as the Service concedes (Petr. Br. 12-13), Congress's principal focus in enacting the 1980 amendments to the INA was on refugee admissions. Thus, the definition of that term was adopted with Section 207's purposes in mind. Those policies require a generous construction of the term "refugee." See pp. 42-44, infra.

In defining "refugee" to revise and regularize admission of "refugees" under Section 207, Congress necessarily made comparable changes regarding Section 208, since all "refugees" are allowed to invoke the Attorney General's discretion in seeking asylum under that section. The Service's discomfort with these arrangements does not justify its efforts to narrow Section 208 by forcing the definition of the term "refugee" into a mold which its language will not permit.

D. The Service contends that it would have been "irrational[]" for Congress to have added a "second avenue of relief" in the form of asylum, when there was already available a withholding-of-deportation provision in the statute. (Petr. Br. 12). To avoid this purported irrationality, the INS asks this Court to construe "refugee" as used in Section 208 narrowly, so as to ensure that applications for asylum under that section do not render "superfluous" the withholding-of-deportation remedy. (Id.). Relatedly, the INS argues that asylum under Section 208 was not intended to replace withholding of deportation as the "legal bar" to deportation of aliens facing persecution abroad. (Petr. Br. 12, 16).

These arguments ignore important differences between Sections 208 and 243(h). Establishing "refugee" status by

proving a "well-founded fear of persecution" and then invoking Section 208 is not a legal bar to deportation, since that section merely allows an alien to invoke the Attorney General's discretion to avoid deportation. By contrast, aliens who prove under Section 243(h) that they "would" be persecuted abroad are, as a matter of law, entitled to avoid deportation. Section 208 is thus not an "irrational" or redundant second avenue to the same destination identified in Section 243(h). Instead, it gives those aliens who cannot satisfy the higher burden necessary to obtain mandatory relief under that section an opportunity to qualify as "refugees" who may invoke the Secretary's discretion to avoid deportation.

Silently acknowledging this point, the INS attempts to minimize the significance of the Attorney General's



discretion under Section 208 by pointing out that he has generally not deported aliens who qualify for relief under that section or under Section 243(h) when the latter section was discretionary, except in cases involving fraud or firm resettlement in a third country. (Petr. Br. 20 n.13, 21-22).<sup>9/</sup> However, it is undeniable that the Attorney General has the discretion to deny asylum to refugees. The text of Section 208 could not be clearer, and this Court emphasized the point in Stevic. 467 U.S. at 423 n.18 ("Meeting the definition of 'refugee' . . . does not entitle the alien to asylum -- the decision to grant a particular application rests in

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<sup>9/</sup> This is hardly surprising, given the Service's crabbed reading of "refugee" as requiring proof that the alien will be persecuted.

the discretion of the Attorney General under § 208(a)."). See also infra p. 44.

Moreover, but for the discretionary nature of asylum under Section 208, Section 243(h) would be superfluous, even as Section 208 is interpreted by the Service. As the Service notes (Petr. Br. at 18-20), a grant of asylum under Section 208 confers greater benefits than withholding of deportation under Section 243(h). Thus, no alien would ever apply for withholding of deportation under Section 243(h), were it not for the fact that a grant of asylum under Section 208(a) is discretionary.<sup>10/</sup>

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<sup>10/</sup> As this Court noted in Stevic, 467 U.S. 426-27 & n.20, Section 243(h) was amended in 1980 to reflect our international commitment to give effect to Article 33 of the U.N. Convention, which prohibits contracting states from expelling or returning aliens to territories where their lives

II. THE LEGISLATIVE HISTORY ESTABLISHES THAT THE "WELL-FOUNDED FEAR" STANDARD DOES NOT REQUIRE AN ALIEN TO PROVE A "CLEAR PROBABILITY" OF PERSECUTION.

The legislative history of the 1980 amendments to the INA evidences, in three separate ways, a congressional intent to employ a "reasonable grounds" standard for determining "refugee" status, rather than requiring proof of a likelihood of persecution. First, the definition of "refugee" was based on definitions that had existed in previous domestic legislation for the admission of refugees into the United States, which required only a

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(Footnote Continued)

or freedom would be threatened. The refugee provisions, however, were intended to implement our commitment under Article 34 of the Convention to facilitate the naturalization of refugees. Unlike Article 33, Article 34 is "precatory and not self-executing," Stevic, 467 U.S. at 428-29 n.22. It accordingly does not require the admission, asylum or naturalization of refugees, but instead permits signatory nations to use their discretion in granting these remedies. See id.



showing that an alien had a "reasonable" or "good" cause or a "rational basis" or "good reason" to fear persecution.

Second, the central purpose of the Act -- to revise and regularize admissions of refugees in a manner that affords sufficient flexibility to address the problem of stateless and homeless persons -- can be achieved only by adopting a more generous test for determining "refugee" status than the one advocated here by the INS. Third, the legislative history plainly states that the definition of refugee was to be construed consistently with the same definition in the U.N. Convention, which uses a "reasonable grounds" for fear standard, rather than the "clear probability" of persecution test.

**A. The Definition of "Refugee" Has Its Origin in Prior Domestic Law That Required Only a "Reasonable Basis" or "Good Cause" Showing.**

The central purpose of the 1980 amendments to the INA was to "establish[] for the first time a comprehensive United States refugee resettlement and assistance policy."<sup>11/</sup> Accordingly, Congress reviewed the 30-year history of refugee statutes to create a more flexible, systematic and humanitarian approach.<sup>12/</sup> To that end, Congress broadened the prior definition of "refugee" to eliminate outmoded ideological and geographical limitations.<sup>13/</sup> As

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<sup>11/</sup> S. Rep. No. 96-256, 96th Cong., 1st Sess. 1 (1979); see H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 1 (1979).

<sup>12/</sup> S. Rep. No. 96-256, supra, at 1-4; H.R. Rep. No. 96-608, supra, at 1-5.

<sup>13/</sup> S. Rep. No. 96-256, supra, at 1, 4; H.R. Rep. No. 96-608, supra, at 1, 9.

the legislative history establishes, see infra at 41, and the INS concedes (Petr. Br. at 12-13, 27), Congress clearly did not intend to narrow the standard of eligibility under the pre-existing refugee definition.

The precursor statutes from which the 1980 definition of "refugee" was drawn all included the same element of "fear of persecution" now found in Section 101(a)(42). The courts consistently interpreted these prior definitions of "refugee" as requiring only a showing of a reasonable basis for that fear, not an actual likelihood of persecution.

1. The Displaced Persons Act of 1948.

The term "refugee" first appeared in the Displaced Persons Act of 1948, P. L. No. 80-774, 62 Stat. 1009. Enacted after World War II in response to the



plight of persons uprooted by the war, the Act authorized the issuance of visas to "eligible displaced persons," § 3(a), 62 Stat. 1010, defined as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization ["IRO"] and who is the concern of the [IRO]." § 2(b), 62 Stat. 1009. The IRO Constitution, in turn, defined "refugee[s] of concern" as persons who objected to being returned to their native lands because of "fear [of persecution] based on reasonable grounds."<sup>14/</sup>

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<sup>14/</sup> Refugees were "the concern of" the IRO if, inter alia, they objected to return to their country of origin because of "persecution, or fear based on reasonable grounds of persecution, because of race, religion, nationality or political opinions. . . ." Constitution of the International Refugee Organization, Annex I, part 1, Section A, subsection 1(a)(i), opened for signature December 15, 1946, entered into force for the United States August 20, 1948, 62 Stat. 3037, T.I.A.S. No. 1846.

Section 4 of the Displaced Persons Act also provided for the adjustment of status of some aliens already in the United States who could not return to their country because of "persecution or fear of persecution on account of race, religion, or political opinions." 62 Stat. 1011. This provision thus afforded in 1948 relief comparable to what Section 208 offers today.

The courts consistently interpreted the Displaced Persons Act as requiring only that the refugee have some "reasonable" basis for fear. See Lavdas v. Holland, 139 F. Supp. 514, 515 (E.D. Pa. 1955), aff'd, 235 F.2d 955 (3d Cir. 1956). Thus, from the very beginning, U.S. domestic legislation for relief of refugees was premised on a showing only of reasonable grounds for fear.

## 2. The Refugee Relief Act of 1953

After the expiration of the Displaced Persons Act, Congress enacted the Refugee Relief Act of 1953, P. L. No. 83-203, 67 Stat. 400, to allow the continued admission of "refugees" into the United States.<sup>15/</sup> This Act altered the previous definition of "refugee" to include

"any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto . . ."  
§ 2(a), 67 Stat. 400.

Thus, like the 1948 Displaced Persons Act, the 1953 statute used the "fear of persecution" test. It also

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<sup>15/</sup> See S. Rep. No. 629, 83rd Cong., 1st Sess. 1 (1953); H.R. Rep. No. 1069, 83rd Cong., 1st Sess. 1-3 (1953).



retained the prior Act's provision granting relief, in the form of adjustment of resident status, to aliens already within the United States who were unable to return to their countries of origin "because of persecution or fear of persecution on account of race, religion, or political opinion." § 6, 67 Stat. 403. The 1953 Act was extended by the Refugee-Escapee Act of 1957, P. L. No. 85-316, 71 Stat. 639.<sup>16/</sup>

Under the 1948, 1953 and 1957 Acts, judicial and administrative decisions continued to interpret the "fear of persecution" language as requiring only a

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<sup>16/</sup> The 1957 Act defined "refugee" to include aliens who fled from and could not return to communist or Middle Eastern countries "because of persecution or fear of persecution on account of race, religion, or political opinion." § 15(c)(1), 71 Stat. 639, 643.

showing of some reasonable grounds for fear, not an actual probability of persecution. See Fong Foo v. Shaughnessy, 234 F.2d 715, 718 n.2 (2d Cir. 1955) (Frank, J., in chambers):

"In the administration of the Displaced Persons Act of 1948 . . . and the Refugee Relief Act of 1953, . . . the Attorney General has decided many claims . . . based on fear of persecution. The question in those cases, as described in an [INS] affidavit . . . is whether the displaced person 'has a reasonable basis to fear persecution, whether or not he would actually be persecuted if he returned to his native country.'" (emphasis added). 17/

3. The 1965 Amendments to the INA

In 1965, Congress amended the INA, to create the first permanent

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<sup>17/</sup> See also Mascarin v. Holland, 143 F. Supp. 427, 428 (E.D. Pa. 1956) ("rational basis"); Cheng Fu Sheng v. Barber, 269 F.2d 497, 500 (9th Cir. 1959) ("rational basis").

statutory basis for the admission of refugees. INA Amendments of 1965, P.L. No. 89-236, 79 Stat. 911. Deriving its definition of "refugee" from the 1957 Refugee-Escapee Relief Act,<sup>18/</sup> Congress authorized, in Section 203(a)(7) of the INA, 8 U.S.C. § 1153(a)(7) (1976), the conditional entry of persons fleeing any communist or Middle Eastern country "because of persecution or fear of persecution." § 3, 79 Stat. 911, 913. Like the previous statutes, Section 203(a)(7) also authorized the adjustment of status of such aliens, within specified limits, if they were already in the United States. Id.

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<sup>18/</sup> See S. Rep. No. 748, 89th Cong., 1st Sess. 16 (1965); see also H. Rep. No. 96-608, 96th Cong., 1st Sess. 3 (1979).



Under Section 203(a)(7), such aliens could be granted conditional entry of adjustment of status, if they could show that they were "persecuted or had good reason to fear persecution." In re Ugricic, 14 I. & N. Dec. 384, 385-86 (1972) (emphasis added). See Stevic, 467 U.S. at 420. This standard, like that under the 1948, 1953 and 1957 Acts, is plainly more generous than the "clear probability" standard urged by the Service here.<sup>19/</sup> Indeed, the Board of Immigration Appeals expressly distinguished the standards in holding that there was "no

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<sup>19/</sup> See In re Kozielczk, 11 I. & N. Dec. 785, 787 (1966) (Polish-Cuban admitted under Section 203(a)(7) based solely on his testimony that he was unwilling to return to Cuba because of his anti-Communist convictions); In re Drachman, 11 I. & N. Dec. 578 (1966) (Polish-Cuban admitted under Section 203(a)(7) based on her statement that she was "unalterably opposed to the Communist government of Castro.").

support in the legislative history [of the 1965 amendment to § 243(h)] for counsel's argument that an alien deportee is required to do no more than meet the standards applied under 203(a)(7) . . . when seeking relief under 243(h)." In re Tan, 12 I. & N. Dec. 564, 569-70 (1967).<sup>20/</sup>

Thus, under the 1965 Act the Service emphasized the distinction between qualification for refugee status and qualification for withholding of deportation, when it served to restrict the scope of the latter remedy. The distinction is equally valid when, as here, it cuts

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<sup>20/</sup> See also In re Janus and Janek, 12 I. & N. Dec. 866, 876 (1968) ("[W]e are not persuaded that an applicant for conditional entry under Section 203(a)(7) is in the same legal posture as an applicant for a withholding of deportation under Section 243(h)"). Note, The Right of Asylum Under United States Law, 80 Colum. L. Rev. 1125, 1138 n.87 (1980).

against the Service and requires a recognition that qualification for refugee status under section 208 requires a lesser showing than an application for relief under Section 243(h).

It is thus clear that, beginning with the 1948 Displaced Persons Act, and continuing through the 1965 amendments to the INA, Congress intended that the term "refugee" include all persons who have a reasonable basis for fearing persecution, not merely those who could show a probability of persecution. Since the Service concedes (Petr. Br. 27 & n.21), as the legislative history dictates,<sup>21/</sup> that the

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<sup>21/</sup> See S. Rep. No. 96-256, supra, at 1, 4 (1979); H. Rep. No. 96-608, supra, at 10 ("the new definition . . . regularizes and formalizes the policies and the practices that have been followed in recent years"); 126 Cong. Rec. 3756 (1980) (Statement of Sen. Kennedy).



present definition of "refugee" set forth in the INA was not intended to narrow the standard of eligibility, it is clear that the Service's present position that an alien must show a clear probability of persecution to qualify for refugee status misreads the statute.

**B. The INS's Narrow Interpretation of "Refugee" is Inconsistent with the Purpose of the 1980 Amendments to the INA.**

Congress' principal purpose in amending the INA in 1980 was to revise and regularize the law concerning admission of refugees.<sup>22/</sup> Consistent with the United States' tradition of "welcoming homeless refugees to our shores," S. Rep. No. 96-256, supra, at 1, the Act adopted a definition

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<sup>22/</sup> S. Rep. No. 96-256, supra, at 1, 3; H.R. Rep. No. 96-608, supra, at 1-5; Stevic, 467 U.S. at 425.

of refugee "that recognizes the plight of homeless people all over the world," id.

The legislative history clearly establishes that Congress intended these revised admissions procedures to be as flexible as possible in order to encompass diverse refugee situations. The new definition of refugee was thought to be "essential . . . to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." H.R. Rep. No. 96-608, supra, at 9. This and other provisions of the Act advanced the "primary objective . . . of equity and flexibility in our treatment of refugees." 125 Cong. Rec. 35815 (1979)

(Statement of Rep. Holtzman).<sup>23/</sup> Plainly, the Attorney General's flexibility would be reduced, not broadened, and the pool of eligible aliens would be contracted, if, as the Service argues, the Attorney General's authority to admit refugees under Section 207 or grant them asylum under section 208 extends only to aliens who are more likely than not to be singled out for persecution.

The Ninth Circuit's interpretation of "refugee," by contrast, clearly

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<sup>23/</sup> See also S. Rep. No. 96-256, *supra*, at 4 (new refugee definition afforded "maximum flexibility in responding to the needs of the homeless who are of concern to the United States"); 126 Cong. Rec. 4498 (1980) (remarks of Rep. Holtzman) (new definition provides "flexibility to deal with crises such as the evacuation of Vietnam in 1975 and to respond . . . to situations in countries such as Cuba or Chile today where there are political detainees or prisoners of conscience of special humanitarian concern to the United States").



affords the flexibility Congress intended to incorporate in the Refugee Act of 1980. It does so, moreover, without threatening an uncontrollable influx of refugees into this country. As Congress recognized, "merely because an individual or group of refugees comes within the definition will not guarantee resettlement in the United States." H.R. Rep. No. 96-608, supra, at 10.

C. The U.N. Convention, Upon Which Section 101(a)(42) Was Based, Adopts a "Good Reason" Standard.

As the Service recognizes, Congress intended that the term "well-founded fear" used to define "refugee" be interpreted in conformity with the same language in the U.N. Convention.<sup>24/</sup>

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<sup>24/</sup> Although the United States is not a party to the U.N. Convention, it is a party to the United

(Petr. Br. 26-27). The negotiating history of the U.N. Convention's definition of "refugee" establishes that the "well-founded fear" standard was intended to be more generous than the "clear probability" standard the INS proposes.

The preliminary draft of the U.N. Convention was prepared by the Ad Hoc

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(Footnote Continued)

Nations Protocol Relating to the Status of Refugees, opened for signature January 31, 1967, entered into force for the United States November 1, 1968, 19 U.S.T. 6224, T.I.A.S. No. 6577 (hereinafter "U.N. Protocol"), which modified the U.N. Convention's definition of "refugee" by eliminating geographical and temporal limitations, and required contracting states to apply the Convention's substantive provisions. U.N. Protocol, art. I. As modified by the U.N. Protocol, the U.N. Convention's definition of "refugee" includes, in pertinent part, "any person who -- owing to well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . ." U.N. Convention, art. I; U.N. Protocol, art. I.

Committee on Statelessness and Related Problems of the U.N. Economic and Social Council. The definition of "refugee" that emerged from that committee incorporated the "well-founded fear" test and was, in substance, the definition that was ultimately adopted by the U.N. Convention.

All of the definitions originally proposed to the Ad Hoc Committee used language that clearly reflected a standard more generous than the INS's "clear probability" standard. The United Kingdom initially proposed a "good reason"/"reasonable ground" standard.<sup>25/</sup> The U.K.

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<sup>25/</sup> Under the first U.K. proposal, the Convention was to apply to "unprotected persons," defined to include:

"persons who, being outside the territory of the State of which they are nationals, do not enjoy the protection of the State either because that state refuses them protection or



delegation then revised that proposal to define a refugee as someone with a "well-founded fear of persecution" based on "good and sufficient reasons."<sup>26/</sup> The French delegation proposed a "justifiable fear" standard.<sup>27/</sup> And the standard

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(Footnote Continued)

because for good reasons (such as, for example, serious apprehension based on reasonable grounds, of political, racial or religious persecution in the event of their going to that state) they do not desire the protection of that State." United Kingdom: Draft proposal for Article 1, U.N. Doc. E/AC.32/L.2 (1950) (emphasis added).

<sup>26/</sup> The U.K.'s revised definition included as a "refugee" a person "who, having left the country of his ordinary residence on account of persecution or well founded fear of persecution . . . does not wish to return to that country for good and sufficient reasons." United Kingdom: Revised draft proposal for Article 1, U.N. Doc. E/AC.32/L.2/rev.1 (1950) (emphasis added).

<sup>27/</sup> The French proposal would have included any person:

"who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution . . . [and for

(Footnote Continued)

suggested by the United States delegation required only a "fear of persecution."<sup>28/</sup> In sum, although the formulations varied, the British, French, and United States proposals all focused upon the refugee's "fear" of persecution; none of these

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(Footnote Continued)

that reason] is unwilling or unable to claim the protection of the said country." France: Proposal for a Draft Convention, U.N. Doc. E/AC.32/L.3 at 3 (1950) (emphasis added).

<sup>28/</sup> The U.S. proposal would have included "any person who is and remains outside his country of nationality or of former habitual residence, because of persecution or fear of persecution on account of race, nationality, religion or political belief" and who belonged to certain specified categories. United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons), U.N. Doc. E/AC.32/L.4 at 1 (1950). Although the U.S. proposal, read literally, would have included persons with purely subjective fears, the U.S. delegate stated that the proposal was based on the IRO Constitution, see Ad Hoc Committee Summary Record of the Fifth Meeting, U.N. Doc. E/AC.32/SR.5 at 3-6 (1950), thus suggesting that the proposal contemplated a "reasonable grounds" standard. See supra at 32-33.

proposals suggested the refugee must prove a "clear probability" of persecution.

After consideration of these proposals, the Ad Hoc Committee arrived at a consensus, and a working group composed of the delegates from France, Israel, the U.K. and the U.S.<sup>29/</sup> drafted the definition of "refugee" that, with minor changes not relevant here, was eventually incorporated in the U.N. Convention. That definition employed the "well-founded fear" test in the manner first proposed by the U.K.<sup>30/</sup> In its report to the Economic and

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<sup>29/</sup> Ad Hoc Committee Summary Record of the Sixth Meeting, U.N. Doc. E/AC.32/SR.6 at 7-8 (1950).

<sup>30/</sup> The definition that emerged from the Ad Hoc Committee read as follows:

"Any person who: (a) as a result of events in Europe after the outbreak of the Second World War and before 1 July 1950 has well founded fears of being the victim of persecution for

(Footnote Continued)



Social Council, the Committee explained the meaning of this standard as follows:

"The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618, E/AC.32/55 at 11 (1950) (emphasis added).

It is thus clear that the "well-founded fear" language that emerged

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(Footnote Continued)

reasons of race, religion, nationality or political opinion, and (b) owing to such fear has left or is outside the country of nationality or if he has no nationality, outside his country of former habitual residence, and (c) owing to such fear is unable or unwilling to avail himself of the protection of the government of his country of nationality." Art. I, Draft Convention, Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618, E/AC.32/55 at 4 (1950).

Compare the definition in the U.N. Protocol, supra note 24.

from the Ad Hoc Committee embodies the "good reason" standard adopted by the Ninth Circuit in this case, not the more stringent "clear probability" standard the INS now proposes. The subsequent deliberations of the Ad Hoc Committee, as well as those of the Social Committee and the General Assembly, confirm that the "refugee" definition was understood to require only a showing of "good reason" to fear persecution.<sup>31/</sup> It was never suggested in these deliberations that a fear of persecution could be "well-founded" only if a

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<sup>31/</sup> See, e.g., Social Committee Summary Record of 160th Meeting, U.N. Doc. E/AC 7/SR.160 at 6-7 (1950) (Statements of Mr. Fearnley, delegate of the United Kingdom, and Mr. Henkin, delegate of the United States). See generally Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 Brooklyn J. Int'l L. 333 (1984).

person was more likely than not to be singled out for persecution.

**III. THE INS'S ARGUMENTS REGARDING THE  
LEGISLATIVE HISTORY OF THE 1980 ACT  
ARE MISCONCEIVED.**

A. The Service emphasizes that in 1979, prior to the adoption of Section 208, the INS amended its regulations to equate the standard for seeking asylum with the standard for withholding of deportation. (Petr. Br. 17). The INS argues that in 1979 it "explicitly rejected suggestions, based on the well-founded fear language of the [U.N.] Convention, that the asylum standard should be less demanding than that for withholding." (Id. at 18). Given this administrative position, the INS now argues, "it is inconceivable that Congress could have intended a lower standard for" asylum when it passed the 1980 Act. (Id.).



But Congress took precisely such "inconceivable" action in 1980. It decided to allow all "refugees" to apply for asylum (although it made clear that such applications could be denied in the discretion of the Attorney General). And when Congress in 1980 defined the term "refugee" in Section 101(a)(42) it used the same "well-founded fear" test that the U.N. Convention adopted, but which the INS had rejected in its 1979 asylum regulations. See note 8, supra p. 20.

B. The INS makes several arguments based on the use of the term "asylum" in the legislative history, all of which are offered to show that Congress intended to equate it with provisions incorporating a "clear probability" standard.

First, it contends that the term "asylum" was used as a synonym for withholding of deportation. This assertion is

based in part on an ambiguity in the testimony of two witnesses. (Petr. Br. 16).<sup>32/</sup> However, the same witnesses ultimately made it clear that "asylum" and "withholding" are distinct concepts and should not be confused.<sup>33/</sup>

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<sup>32/</sup> The Service also cites a Congressional Research Service Study for the proposition that "asylum" was considered the equivalent of "withholding of deportation" (Petr. Br. at 16). However, the term "asylum" appears to have been used in this study to refer to any form of relief given to refugees already in the United States, for after discussing the Attorney General's parole authority, the Study cites Section 243(h) as "[a]n additional provision used to provide asylum to aliens in the United States." The Refugee Act of 1979: Hearings on S. 643 Before the Senate Judiciary Comm., 96th Cong., 1st Sess. 197 (1979). Cf. infra at 56-57 ("asylum" used to refer to relief under Section 203(a)(7)).

<sup>33/</sup> See The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm., 96th Cong. 1st Sess. 170, 184 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International) ("It seems that it shouldn't be necessary to claim asylum through a procedure designed to allow one to withhold

Second, the INS notes that the term "asylum" was used in the House Report to refer to the Service's 1979 regulations, and suggests that this indicates that Congress intended to enact those regulations. (Petr. Br. 16-18). However, Congress only recognized the existence of the regulations and noted the absence of any statutory basis for them. H.R. Rep. 96-608, supra, at 17 (1979). The only clear statement in the legislative history regarding the relationship of the 1979 asylum regulations to the new statutory provision was Senator Kennedy's observation that the "[p]resent [asylum] regulations and procedures now used by the immigration Service simply do not conform to either the spirit or to the

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(Footnote Continued)

deportation under 243(h). Those are not necessarily the same questions.") (emphasis added).



new provisions of this Act." 126 Cong. Rec. 3757 (1980) (emphasis added).

Third, the Service relies on two statements in the legislative history to the effect that the Act was not intended to alter the standards for asylum (Petr. Br. 26), suggesting that the "would be persecuted" standard of its 1979 regulations was to be perpetuated. However, the INS ignores the fact that the term "asylum" was previously used to refer to refugee admissions or adjustment of status under former Section 203(a)(7),<sup>34/</sup> neither of

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<sup>34/</sup> See, e.g., Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm., 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International) (referring to "the process by which an alien can claim asylum and thereby request admission to the country as a refugee"). See also H.R. Rep. No. 96-608, supra, at 3 (describing previous use of Attorney General's parole

which required aliens to prove that they "would be persecuted." See pp. 37-40, supra. Indeed, before the enactment of Section 208, the adjustment of status proviso of Section 203(a)(7) offered the form of statutory relief most analogous to asylum; this Court in Stevic in fact used the term "asylum" to refer to relief under that section. 467 U.S. at 416 n.8. Thus, any statements in the legislative history to the effect that the 1980 Act did not alter the standard for "asylum" could well have referred to the prior standard applicable under Section 203(a)(7).<sup>35/</sup>

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(Footnote Continued)

authority under Section 212(d)(5) of the INA to "offer asylum" to refugees).

<sup>35/</sup> Additionally, one of the quoted statements is plainly inapposite because it referred to the Senate version of the bill, which, as the government points out (Petr. Br. 15-16 n.10), expressly adopted the withholding-of-deportation

(Footnote Continued)

Finally, this case does not involve construction of the term "asylum" in Section 208. Instead, it involves construction of the term "refugee" as defined in Section 101(a)(42) and used in Sections 207-209. Any possible confusion by Congress in the 1980 legislative history as to the term "asylum" does not justify a misconstruction of the term "refugee," when it applies not only to asylum under Section 208, but also to admissions under Section 207 and adjustment of status under Section 209.

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(Footnote Continued)

standard. See S. Rep. No. 96-256, *supra*, at 9 (1979). This version was rejected in favor of the House version, which adopted the "well-founded fear" standard. The other statement the government cites was made in response to a question by Congressman Fascell regarding Section 203(a)(7). The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 71 (1979).



C. The Service argues that before 1980 there was a uniform judicial and administrative interpretation of the "well-founded fear" standard as being synonymous with the "clear probability" standard and that Congress should be deemed silently to have adopted that interpretation.

The INS relies primarily on this Court's discussion in Stevic of the Post-U.N. Protocol, pre-Refugee Act case-law under Section 243(h). (Petr. Br. 24-25). Stevic, however, establishes only that "the [U.N.] Protocol was the source of some controversy with respect to the standard for Section 243(h) claims for withholding of deportation." 467 U.S. at 420. Moreover, this Court specifically refused to apply a "well-founded fear" test under Section 243(h). 467 U.S. at 425-28.

Stevic did note that, "[a]lthough before In re Dunar [14 I. & N. Dec. 310 (B.I.A. 1973)], the Board and the courts had consistently used a clear-probability or likelihood standard under section 243(h), after that case the phrase 'well-founded fear' was employed in some cases," 467 U.S. at 419. It is these cases on which the Service primarily relies for the proposition that the "the well-founded fear terminology [was used] interchangeably with the clear probability and likelihood language." (Petr. Br. 25). The use of the phrase "well-founded fear" in some pre-1980 Section 243(h) cases, however, falls far short of establishing that the phrase was considered the equivalent of "clear probability" of persecution in those cases.

Most of these cases simply denied withholding of deportation after finding that the alien had failed to prove

a "well-founded fear" of persecution. They stand only for the unexceptionable proposition that the "clear probability" standard of Section 243(h) is at least as stringent as the "well-founded fear" standard. Thus, the aliens' failure to establish a well-founded fear of persecution in those cases, a fortiori, disqualified them from withholding of deportation. The cases thus did not have to decide whether "well-founded fear" was the equivalent of "clear probability," and most did not.<sup>36/</sup>

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<sup>36/</sup> See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132-34 (5th Cir. 1978); *Martineau v. INS*, 556 F.2d 306, 307 & n.2 (5th Cir. 1977); *Henry v. INS*, 552 F.2d 130, 131-32 (5th Cir. 1977); *Pereira Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977); *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976); *Paul v. INS*, 521 F.2d 194, 200 (5th Cir. 1975); *Gena v. INS*, 424 F.2d 227, 232 (5th Cir. 1970); *In re Williams*, 16 I. & N. Dec. 697, 700-02, 704 (B.I.A. 1979); *In re François*, 15 I. & N. Dec. 534, 539



A handful of the cases did suggest (in dictum) that the "well-founded fear" and "clear probability" standards were equivalent or substantially similar. See Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977). However, there were conflicting cases which recognized that the two standards were different. See, e.g., Coriolan v. INS, 559 F.2d 993, 997 n.8 (5th Cir. 1977). Moreover, until this Court clarified the point in Stevic, it was not clear that "clear probability" meant "more likely than not," and some cases appear to have interpreted the standard as more lenient. See In re Martinez Romero, Int. Dec. No. 2872 (BIA

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(Footnote Continued)

(B.I.A. 1975); In re Mladineo, 14 I. & N. Dec. 591, 592 (B.I.A. 1974); In re Maccand, 14 I. & N. Dec. 429, 434 (B.I.A. 1973), aff'd, 500 F.2d 355 (2d Cir. 1974); In re Bohmwald, 14 I. & N. Dec. 408, 409 (B.I.A. 1973).

1981) (Section 243(h) requires an alien to demonstrate "realistic likelihood that he, or a class to which he belongs, will be persecuted.").

In sum, prior to 1980 there was no clear consensus that the "well-founded fear" standard was equivalent to the "more likely than not" standard now clearly applicable under Section 243(h). There is no clear indication in the legislative history that Congress intended to ratify those cases which did equate the two standards. Consequently, the Service's ratification argument must fail.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

E. Edward Bruce\*  
Carol Fortine  
Carlos M. Vázquez  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 7566  
Washington, D.C. 20044  
(202) 662-6000

\*Counsel of Record

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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IMMIGRATION AND NATURALIZATION SERVICE,  
*Petitioner*

v.

LUZ MARINA CARDOZA-FONSECA,  
*Respondent*

---

**On Writ Of Certiorari To The United States  
Court Of Appeals For The Ninth Circuit**

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**BRIEF OF THE OFFICE OF THE UNITED  
NATIONS HIGH COMMISSIONER FOR  
REFUGEES AS AMICUS CURIAE IN  
SUPPORT OF RESPONDENT**

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SHAMSUL BARI, Esq.  
GUY S. GOODWIN-GILL, Esq.  
JOACHIM HENKEL, Esq.  
IVOR JACKSON, Esq.

RALPH G. STEINHARDT  
720 20th Street, N.W.  
Washington, D.C. 20052  
(202) 676-5739

United Nations High Com-  
missioner for Refugees

Attorney for Amicus Curiae

408P

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## INTEREST OF THE AMICUS

This brief is submitted *amicus curiae* by the Office of the United Nations High Commissioner for Refugees, with the consent of the parties.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with the responsibility of providing international protection, under the auspices of the United Nations, to refugees within its mandate and of seeking permanent solutions to the problems of refugees.<sup>1</sup> The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, *inter alia*:

Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. . . .<sup>2</sup>

This supervisory responsibility of the UNHCR is formally recognized in Article II, paragraph 1, of the United Nations Protocol of 1967 relating to the Status of Refugees (1967 Protocol), to which the United States became a party in 1968:

The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

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<sup>1</sup> U.N. General Assembly Res. 428(V) 1950; Annex: *Statute of the Office of the United Nations High Commissioner for Refugees*, para. 1.

<sup>2</sup> *Id.*, para 8.



The present case, concerning as it does the interpretation of statutory provisions deriving from the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention), through the 1967 Protocol, presents questions involving the essential interests of refugees within the mandate of the High Commissioner. Its resolution is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum to those who qualify for such status. The decision in this case, moreover, can be expected to influence the manner in which the authorities of other countries apply the refugee definition contained in the 1951 Convention and incorporated by reference in the 1967 Protocol.

Much of the present submission reproduces the UNHCR's *amicus curiae* brief in *INS v. Stevic*, 467 U.S. 407 (1984). In that brief, the UNHCR addressed an issue ultimately reserved by the Court, 467 U.S. at 430, and squarely presented by the present case, namely the meaning of the phrase "well-founded fear of being persecuted" as used in the 1951 Convention, the 1967 Protocol, and domestic law.

For these reasons, the UNHCR respectfully submits this brief in support of the interpretation of the relevant provisions of the 1967 Protocol, which was adopted by the Court of Appeals for the Ninth Circuit in the decision below.

### SUMMARY OF ARGUMENT

In this brief, the UNHCR will demonstrate, first, that Congress plainly intended to conform U.S. statutory law to U.S. treaties. It accomplished this through the language of sections 101 and 208 of the Immigration and Nationality Act (8 U.S.C. §§ 1101(a)(42)(A), 1158(a)), which make asylum available as a matter of domestic law to any refugee as defined in the 1951 Convention, 189 U.N.T.S. 150, and

the 1967 Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 268. The legislative histories of the United States' accession to the 1967 Protocol, and of the Refugee Act of 1980, Pub.L.No.96-212, 94 Stat. 102, *et seq.*, show that the refugee definition in these international instruments has been incorporated without qualification into United States law. Congress also intended to ensure that United States statutes and regulations would be construed in a manner consistent with the relevant international norms.

Second, this brief will show that the refugee definition in Article 1 of the 1951 Convention must be interpreted to mean that a person should be recognized as a refugee if he or she has "good reason" to fear persecution for the stated reasons; that is, if his or her subjective fear of being persecuted is based upon an objective situation which makes that fear plausible and reasonable under the circumstances. A person may have good reason to fear persecution even though it cannot be established that it is more likely than not that he or she would in fact be persecuted. The UNHCR's interpretation of the term "well-founded fear of being persecuted" is based on the legislative history of the 1951 Convention, the interpretation given to a similar term in the Constitution of the International Refugee Organization (IRO), from which the 1951 Convention definition derives, the stated objectives of the international community in adopting this Convention, and the plain meaning of the words themselves. The standard of "likelihood" or "clear probability" of persecution, which has been interpreted to mean that an applicant must prove that he or she would more likely than not be subjected to persecution, is inconsistent with the requirements of the 1967 Protocol in three distinct but related ways: (1) the standard suggests that fear cannot be "well-founded" unless it is based upon a more than even chance that the feared event will actually happen, which contradicts the intent of the drafters and the plain meaning of the chosen phrase; (2) the "clear probability" standard focuses on the

objective likelihood of persecution and therefore effectively devalues the subjective term "fear", which is a fundamental element of the refugee definition; and (3) the "clear probability" standard ignores the difficulties which genuine refugees face in producing particularized evidence. Thus, such a standard increases the possibility of erroneous decisions resulting in the denial of asylum to those who have a well-founded fear of persecution.

### ARGUMENT

#### I. IT IS NOT DISPUTED THAT CONGRESS HAS CONSISTENTLY INTENDED TO CONFORM UNITED STATES LAW WITH THE 1967 PROTOCOL AND THE 1951 CONVENTION BY INCORPORATING THE INTERNATIONAL DEFINITION OF "REFUGEE" INTO DOMESTIC LAW WITHOUT QUALIFICATION.

A. In Passing The 1980 Refugee Act, Congress Plainly Adopted The Definition Of "Refugee" Contained In The 1951 Convention And The 1967 Protocol And Directed That It Should Be Interpreted Consistently With Those International Instruments. The Quantum Of Proof Required To Satisfy That Standard, Which Is The Fundamental Issue In This Case, Was Not Addressed.

At the threshold, it is clear that the plain language of a statute is ordinarily conclusive on issues of statutory interpretation. *Russello v. United States*, 104 S.Ct. 296, 299 (1983). In this case, the starting point must be section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), which specifically contemplates the discretionary grant of asylum to any alien who "is a refugee within the meaning of section [101(a)(42)(A)] 1101(a)(42)(A) of this title." In turn section 101(a)(42)(A) provides in pertinent part:

The term "refugee" means (A) *any person who is outside any country of such person's nation-*

*ality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . .*

8 U.S.C. § 1101(a)(42)(A) (emphasis supplied). The language chosen in 1980 by Congress to define "refugee" tracks virtually verbatim the corresponding provisions of the 1967 Protocol, which defines a "refugee" as an individual who

*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*

1967 Protocol, article 1(2) (emphasis supplied).

Even without the gloss of legislative intent, Congress plainly used the international term of art—"well-founded fear of persecution"—to define the appropriate asylum standard. By contrast, as noted by this Court in *Immigration and Naturalization Service v. Stevic*, 467 U.S. 407 (1984), Congress chose not to use the phrases "well-founded fear" or "refugee" in promulgating section 243(h) of the Act. The disparity is significant. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United*



*States, supra*, at 300 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Here the conclusion is inescapable (and to date undisputed) that the language of the statutory asylum provisions incorporates without qualification the international definition of "refugee".

Moreover, all parties apparently agree that Congress, in adopting the Refugee Act of 1980,<sup>3</sup> intended to conform United States domestic law with its international obligations under the 1967 Protocol. Brief for the Petitioner herein, Immigration and Naturalization Service (hereinafter cited as INS Brief) at 26, 27. It first replaced the existing refugee definition, which would "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the 1951 United Nations Refugee Convention and Protocol. . . ."<sup>4</sup> Congress, responding to developing international standards and refugee needs, including the provisions of the 1967 United Nations Declaration on Territorial Asy-

<sup>3</sup> Pub. L. No. 96-212, 94 Stat. 102, *et seq.*

<sup>4</sup> H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9; S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19. For similar contemporary statements, see *Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 96-781, 96th Cong., 2nd Sess. (1980) at 19; S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 4. See also 126 Cong. Rec. H1521 (daily ed. March 4, 1980), remarks of Rep. Holtzman: "House definition of the term 'refugee' . . . essentially conforms to that used under the United Nations Convention and Protocol relating to the status of refugees." *Accord* 125 Cong. Rec. H11967 (daily ed. December 13, 1979); *Id.* at H11969 (remarks of Rep. Rodino); *Id.* at H11973 (remarks of Rep. Chisholm); *Id.* at H11979 (remarks of Rep. Esbbecki); 126 Cong. Rec. S1753-S1754 (daily ed., February 26, 1980) (statement of Sen. Kennedy). Administration witnesses were equally emphatic. See *The Refugee Act of 1979, Hearings on H.R. 2816, Before the Subcommittee on International Operations of the House Committee on Foreign Affairs*, 96th Cong., 1st Sess. (1979) at 71 (remarks of Ms. Doris Meisner, Deputy Associate Attorney General: "What we have done in the Administration bill is simply incorporated the United Nations' definition for 'refugee'. . . .")

lum,<sup>5</sup> also incorporated an asylum provision in the legislation for refugees who meet this international definition.<sup>6</sup>

In the discussions concerning the new refugee definition no reference was made to the standard of proof. They simply reflect the intent of Congress to bring United States statutory law into conformity with the 1967 Protocol and to incorporate its refugee definition without any qualification into domestic law.

The legislative history of asylum similarly provides no support for the Petitioner's claim that Congress understood the phrase "well-founded fear of persecution" to be equivalent to such a standard of proof as would require an alien claiming asylum to show a likelihood or clear probability of persecution. INS Brief at 12. The Petitioner relies upon the statement in the Senate Report that,

The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol. . . .<sup>7</sup>

The Petitioner also relies on the remarks of Mr. David Martin, Office of the Legal Advisor, Department of State,

<sup>5</sup> U.N. General Assembly Res. 2312 (XXII) of 14 December 1967. In its 1977 Conclusions, the Executive Committee of the High Commissioner's Programme, which advises the High Commissioner in the exercise of his statutory functions and which comprises 41 States members (including the U.S.), expressly appealed to governments to follow liberal practices in granting asylum: Report of the 28th Session, UN Doc. A/AC.96/549, para. 53.3(d), an appeal repeated the following year: Report of the 29th Session, UN Doc. A/AC.96/559, para. 68.1(d). See also Report of the 30th Session: UN Doc. A/AC.96/572, para. 72(2)(a)(1979) ("States should use their best endeavours to grant asylum to bona fide asylum-seekers".)

<sup>6</sup> H.R. Rep. No. 96-608, *supra*, at 17-18.

<sup>7</sup> S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 9, quoted in INS Brief at 26.



that "[f]or purposes of asylum, the provisions in this bill do not really change the standards." INS Brief at 26.

The reference to no change in the "substantive standard", however, merely emphasized that asylum would be granted as before only to persons fulfilling certain criteria in the United Nations definition—the 'standard' in this sense being that of refugee. The report does not allude to the standard of proof, i.e. to the manner in which eligibility or entitlement is to be established, questions of which Congress may not even have been aware. Indeed, as Mr. David Martin later testified in connection with the burden of proof question in asylum proceedings:

The Refugee Act . . . never became the occasion for a thorough-going reconsideration of the problems in the asylum process, largely because these problems really did not become fully apparent until after the Act was in place.<sup>8</sup>

In the legislative history of the Refugee Act of 1980, there is thus no indication that Congress intended the new refugee definition to be applied in the manner in which the Board of Immigration Appeals had previously applied the withholding of deportation provision of the Immigration and Nationality Act. The Refugee Act of 1980 incorporates the United Nations 'standard', insofar as that standard is equated with the definition of a refugee, but does not address the standard of proof required to be met by those who claim the benefit of that definition. On the contrary, both the House and Senate reports unequivocally reflect Congress' intention that the new refugee definition conform with the definition in the 1967 Protocol and should

<sup>8</sup> *Asylum Adjudication: Hearings Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981) at 132.* Note also Petitioner's concession that asylum was introduced almost as an afterthought. INS Brief at 20.

"be construed consistent with the Protocol".<sup>9</sup> This would be required even if the legislative history of the Act were ambiguous. It is established that an act of Congress "ought never to be construed to violate the law of nations if any other possible construction remains". *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *Accord, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1962).

**B. Nothing In The Legislative History Of The United States' Accession To The 1967 Protocol Implies That Congress Intended To Endorse Any Prior Standard Of Proof Which Might Be Inconsistent With The Protocol.**

Since 1968, the United States has been a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Convention. Both instruments provide for the fair and humane treatment by States Parties of any person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, is unable or unwilling to return to his or her country of nationality or of former habitual residence if stateless.

The history of accession shows that the Senate focused its attention first on the *admission* of refugees (i.e. after selection overseas), and secondly on areas where possible amendments to United States legislation might be called for. In a prepared statement, Mr. Lawrence A. Dawson commented that accession to the 1967 Protocol "does not in any sense commit the Contracting State to enlarge its immigration measures for refugees".<sup>10</sup> This view was reiterated by Mr. Dawson during the hearing before the Senate Foreign Relations Committee when he stated "that there is nothing in this Protocol which implies or puts any

<sup>9</sup> H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9. S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19, 20.

<sup>10</sup> S. Exec. Doc. K, 90th Cong., 2nd Sess. (1968) at 7.

pressure on any Contracting State to accept additional refugees as immigrants".<sup>11</sup>

These statements relate exclusively to refugee admissions, a matter not addressed in the 1951 Convention and the 1967 Protocol, and they have no bearing on the application of the refugee definition in asylum proceedings.

In referring to the obligations under Articles 32 and 33 of the 1951 Convention, Mr. Dawson declared:

... the asylum concept is set forth in the prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act *with limited exceptions*, are consistent with this concept. *The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment to the Act.*<sup>12</sup>

The report of the Secretary of State was to the same effect.<sup>13</sup>

As Mr. Dawson stressed during the hearings, the Attorney General could implement the changes required by accession to the 1967 Protocol "without the enactment of any further legislation" and "without amendment to the Act".<sup>14</sup>

<sup>11</sup> S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968) at 10.

<sup>12</sup> *Id.* (emphasis supplied).

<sup>13</sup> S. Exec. Doc. K, 90th Cong., 2nd Sess. (1968) III at VIII.

<sup>14</sup> S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968) at 8 (emphasis supplied).

The legislative history of accession to the 1967 Protocol thus shows that the Senate did not touch upon the question of the interpretation and application of the refugee definition but focused on areas where accession might possibly require changes in United States laws. In particular, the Senate did not address the question of the standard of proof to be applied in asylum cases. There is no indication that the Senate intended to endorse the "clear probability" standard previously applied by certain lower courts and the Board of Immigration Appeals (BIA). It suggests, on the contrary, that this practice would need to be modified in so far as it could be inconsistent with the 1967 Protocol, and that it could be so modified through the exercise of administrative discretion, without any legislation.

## II. THE TERM "WELL-FOUNDED FEAR OF BEING PERSECUTED" IN THE 1951 CONVENTION MEANS THAT A PERSON SEEKING REFUGEE STATUS MUST SHOW THAT HIS OR HER SUBJECTIVE FEAR OF PERSECUTION IS BASED UPON OBJECTIVE FACTS WHICH MAKE THE FEAR REASONABLE UNDER THE CIRCUMSTANCES, BUT NOT NECESSARILY THAT HE OR SHE WOULD MORE LIKELY THAN NOT BECOME THE VICTIM OF PERSECUTION.

### A. The Drafters Of The 1951 Convention Agreed That Fear Should Be Considered Well-Founded When A Person Can Show "Good Reason" Why He Or She Fears Persecution.

The term "well-founded fear of being persecuted for reasons of race, religion, nationality . . . or political opinion" originated with the Ad Hoc Committee on Statelessness and Related Problems, which had been appointed in August 1949 by the United Nations Economic and Social Council (ECOSOC) to consider whether it was desirable to prepare a "revised and consolidated convention relating to the international status of refugees" and stateless persons,



and if so to draft such a convention.<sup>15</sup> At its first session in January 1950, draft proposals for Article 1 of the Convention—the refugee definition—were submitted by the United Kingdom, France and the United States.<sup>16</sup> The drafts contained differences concerning the categories of persons to be covered by the convention,<sup>17</sup> but each included persecution or the fear of persecution as the basic element of the refugee definition.

The United Kingdom's proposal referred to "good reasons" for being unwilling to return to one's country of origin "such as, for example, serious apprehension based on reasonable grounds of . . . persecution."<sup>18</sup> The original French draft proposal for Article 1 recognized the refugee status of any person ". . . who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution. . . ."<sup>19</sup> The United States proposal applied the term "refugee" to persons defined as such in the various pre-war arrangements and conventions, and also to "any person who is and remains outside his country of nationality or former habitual residence because of persecution or fear of persecution on account of race, nationality, religion or political belief", provided such person also belonged to one of certain specified categories.<sup>20</sup> The

<sup>15</sup> ECOSOC Res. No. 248 B (IX) of 8 August 1949. *See generally* Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618 and Corr. 1 of 17 February 1950 (hereinafter cited as *Report*).

<sup>16</sup> U.N. Docs. E/AC.32/L.2, E/AC.32/L.3, E/AC.32/L.4 and Add.1 (17 January 1950).

<sup>17</sup> Briefly, the United Kingdom and France preferred to rely upon a broad general definition, while the United States proposal, although including a general definition, listed specific categories of refugees to be covered by the Convention.

<sup>18</sup> U.N. Doc. E/AC.32/L.2 (17 January 1950).

<sup>19</sup> U.N. Doc. E/AC.32/L.3 (17 January 1950) at 1 and 2.

<sup>20</sup> U.N. Doc. E/AC.32/L.4 and Add.1.

representative of the United States explained that the point of departure for the U.S. draft proposal, subject to certain modifications, had been the definition in the Constitution of the International Refugee Organization.<sup>21</sup>

On January 19, 1950, the United Kingdom submitted a revised draft proposal for Article 1 in which the term "well-founded fear of persecution" appears for the first time:

In this Convention, the expression "refugee" means, except where otherwise provided, a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country.<sup>22</sup>

On the same day, the Ad Hoc Committee appointed a working group composed of the representatives of four countries—France, Israel, the United Kingdom, and the United States—to draft a refugee definition that would obtain general approval, using the United States proposal as the basic working document.<sup>23</sup> On January 23, the working group presented a provisional draft which employed, for persons who became refugees as a result of events in Europe after September 3, 1939, and before January 1, 1951, the term "owing to persecution, or a well-founded fear of persecution, for reasons of race, religion, nationality or political opinion".<sup>24</sup> With certain stylistic modifi-

<sup>21</sup> U.N. Doc. E/AC.32/SR.5, para 9. *See* II(B), *infra*.

<sup>22</sup> U.N. Doc. E/AC.32/L.2/Rev.1 (19 January 1950).

<sup>23</sup> U.N. Doc. E/AC.32/SR.6 at 6-8. The representatives of the International Refugee Organization also participated in the deliberations of the working group.

<sup>24</sup> U.N. Doc. E/AC.32/L.6.



cations, but with no disagreement as to the substance, this was accepted as the central element of the definition applicable to post-war refugees in the Draft Convention adopted by the Ad Hoc Committee and transmitted to the Economic and Social Council.<sup>25</sup>

The Secretary-General invited governments to comment on the Draft Convention. None of the comments received suggested any disagreement as to the use of the specific term "well-founded fear of persecution" in the refugee definition.<sup>26</sup>

This refugee definition was extensively discussed in the Economic and Social Council at its 11th Session (August 1950),<sup>27</sup> in the Fifth Session of the United Nations General Assembly,<sup>28</sup> and in the Conference of Plenipotentiaries which met in Geneva in July 1951 to consider and adopt the 1951 Convention in its definitive form. These discussions, however, focused almost exclusively on questions such as date-lines, categories of persons to be included, criteria for exclusion, and the geographical limitation. The basic refugee definition adopted by the Ad Hoc Committee was not questioned; after stylistic changes it emerged substantially unaltered in the 1951 Convention.<sup>29</sup>

<sup>25</sup> U.N. Doc. E/1618 and Corr. 1, Annex I (17 February 1950).

<sup>26</sup> See, U.N. Doc. E/AC.32/L.40, Memorandum by the Secretary-General of 10 August 1950.

<sup>27</sup> See ECOSOC Res. 319 B (XI) of 16 August 1950, and U.N. Doc. A/1396, *Draft Convention relating to the Status of Refugees: Note by the Secretary-General* (26 September 1950).

<sup>28</sup> See U.N. G.A. Res. 429(V) of 14 December 1950 and U.N. Doc. A/1682, *Report of the Third Committee* (12 December 1950).

<sup>29</sup> The same basic definition figures in the Statute of the Office of the UNHCR, U.N. G.A. Res. 428(V) of 14 December 1950, Annex, paras. 6(A)(ii) and 6(B).

In its final report to ECOSOC, the Ad Hoc Committee provided extensive comments on the provisions of the Draft Convention, including the following:<sup>30</sup>

The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show *good reason* why he fears persecution. . . .<sup>31</sup>

The formulation adopted by the Committee was generally approved and was thereafter included without debate in virtually all subsequent draft definitions.<sup>32</sup> The *travaux préparatoires* to the 1951 Convention contain no further discussion of its meaning, and the comment of the Ad Hoc Committee remains the final statement by the framers of the 1951 Convention interpreting the term "well-founded fear of being persecuted."

The Petitioner asserts that the drafters "rejected formulations of the well-founded fear standard that would have required only that the alien's fear be 'plausible', 'justifiable', or 'reasonable'." INS Brief at 30, fn. 22. The Petitioner reaches this conclusion, however, through the apparent accident of misquotation or misinterpretation of

<sup>30</sup> *Report*, U.N. Doc. E/1618, Annex II, at 39. The report of the Ad Hoc Committee, including the Draft Convention and the explanatory comments, together with the comments of Governments, was transmitted by ECOSOC to the U.N. General Assembly. See ECOSOC Res. 319 (B)(XI), footnote 27, *supra*.

<sup>31</sup> *Report*, U.N. Doc. E/1618 at 39.

<sup>32</sup> See, e.g., U.N. Doc. E/L.82(ECOSOC)(France: amendment to the draft convention relating to the status of refugees)(29 July 1950) and U.N. G.A. Docs A/C.3/L.114, A/C.3/L.115, A/C.3/L.125, A/C.3/L.130 and A/C.3-L.131 Rev.1 (2 November-1 December 1950). (Various countries proposed definitions of "refugee" (reprinted in 5 UNGAOR), Annex (Agenda Item 32) 16-20 (1950).

a draft of the Ad Hoc Committee's final report. The passage involved actually provides in full:

The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, national'ty or political opinion' means that a person has either been actually a victim of persecution *or can give a plausible account why he fears persecution*.<sup>33</sup>

Thus, between its draft and final reports, the Committee replaced "plausible account" with "good reason" as its gloss on the "well-founded fear" criterion. But there is no suggestion under either formulation that persecution must be more likely than not; indeed, even assuming *arguendo* that there is any meaningful difference between "good reason" and "plausible account", it would be wholly inconsistent with the history and intent of the Convention to interpret the substitution of one for the other as even a remote endorsement of the stricter "clear probability" standard. Moreover, as shown in the next section, when the Convention was drafted, "good reason" and "plausible account" were thought to be generally equivalent formulations of the accepted standard. The interpretation urged by the Petitioner has no basis in the history of the Convention.

**B. The Term "Well-Founded Fear Of Being Persecuted" In The 1951 Convention Was Based On The Constitution And Practice Of The International Refugee Organization (IRO), Which Required No More Than That An Applicant Show Plausible Reason For Fearing Persecution.**

The Ad Hoc Committee on the Draft Convention included the following "general observation":

In drafting this convention the Committee gave careful consideration to the provisions of previous

<sup>33</sup> See U.N. Doc. E/AC.32/L.38 at 33-34 (emphasis supplied).

international agreements. It sought to retain as many of them as possible in order to assure that the new consolidated convention should afford *at least as much protection* to refugees as had been provided by previous agreements. . . .<sup>34</sup>

As noted, the Constitution of the International Refugee Organization had served as the point of departure for the refugee definition in the U.S. draft proposal.<sup>35</sup> Under the IRO Constitution, the determination of whether a refugee or displaced person was of concern to the Organization involved an evaluation of the validity of their objections to returning to their country of origin. The term "well-founded fear of persecution" in the first drafts of the 1951 Convention derives from one of the three "valid objections" listed in the IRO Constitution:

The following shall be considered as valid objections: (1) Persecution, or fear, based on *reasonable grounds* of persecution because of race, religion, nationality or political opinion, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations. . . .<sup>36</sup>

The parallel between this language and that used in the U.S. and other draft proposals<sup>37</sup> is obvious. The term used in the official French version of the IRO Constitution as the equivalent of "fear, based on reasonable grounds of persecution" is "*crainte fondee de persecution*". This precise phrase was used in the draft proposal submitted by

<sup>34</sup> Report, U.N. Doc. E/1618 at 37.

<sup>35</sup> See text accompanying footnote 23, *supra*.

<sup>36</sup> Constitution of the International Refugee Organization, 18 U.N.T.S. 283, at 3, Annex I, Part I, Section C(1)(a)(i) (emphasis added).

<sup>37</sup> See U.N. Doc. E/AC.32/L.4, *supra*, at 5; U.N. Doc. E/AC.32/SR.5 at para.9; U.N. Doc. E/AC.32/L.3 (17 January 1950).



the representative of France to the Ad Hoc Committee, and was translated from the original French on that occasion as "justifiable fear of persecution". The original United Kingdom proposal to the Ad Hoc Committee had also used a term, "serious apprehension based on reasonable grounds . . . of persecution", very close to the IRO terminology. Finally, the term used in the revised United Kingdom proposal (and eventually adopted by the Committee), "well-founded fear", is so close to the French "*crainte fondee*" as to appear to be a retranslation. Thus it is evident that the members of the Ad Hoc Committee were willing to adopt, for the basic refugee definition in the Draft Convention, an expression which was in effect a rephrasing of the term used in the IRO Constitution.

The close connection between the terms "fear, based on reasonable grounds of persecution" in the IRO Constitution and "well-founded fear of being persecuted" in the 1951 Convention is significant for an understanding of the latter term inasmuch as the meaning of the earlier phrase had been clearly established through the eligibility decisions made by the IRO.

The *Manual for Eligibility Officers* published by the IRO includes the following comments on the meaning of the term "persecution or fear based on reasonable grounds of persecution":

Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling the Eligibility Officer cannot refuse to

consider the objection as valid when it is plausible. . . .<sup>38</sup>

Although the IRO Eligibility Manual was prepared for use by the organization's eligibility officers rather than by government officials, it was based on eligibility decisions of which governments were well aware.<sup>39</sup> The representatives of the United Kingdom on the Ad Hoc Committee referred explicitly to the IRO eligibility practice as having built up "a body of interpretive [*sic*] decisions" and considered that "the U.S. draft proposal was intended to be interpreted in the light of these precedents".<sup>40</sup> The U.S. delegate for his part referred to the established meaning of the IRO terminology used in the U.S. proposal and stated that the definition of "neo-refugees" (i.e., those included in the general post-war definition) had "already appeared in the IRO Constitution where its meaning was quite clear. It would have to have an identical meaning in the Convention".<sup>41</sup>

<sup>38</sup> IRO *Manual for Eligibility Officers* at 24.

<sup>39</sup> The IRO Review Board submitted reports of its activities to the IRO General Council, on which the member Governments sat. See e.g. IRO Document GC/103, *Report of the Chairman of the Eligibility Review Board* (21 September 1949), which refers to the "more liberal view" taken by the Board concerning applicants' failure to provide documentary proof, and the practice of according "the benefit of the doubt" to applicants. The IRO *Eligibility Manual* itself was circulated to governments in February 1950 and was discussed by government representatives at the IRO General Council Fifth Session in March 1950 (IRO General Council, Fifth Session, Summary Records (GC/SR/64, 69, Annex 70).

<sup>40</sup> U.N. Doc. E/AC.32/SR.6 at 3.

<sup>41</sup> U.N. Doc. E/AC.32/SR.5 at 2-5. The U.S. delegate similarly defended the use of the IRO terminology in the Draft Convention:

But there is no question about what was meant. It was clearly understood that those who had fled as a result of persecution or fear therefor, or entertaining fears thereof, in their countries of



The deliberations of the Ad Hoc Committee thus demonstrate that the drafters of the refugee definition in the 1951 Convention were fully aware of the close connection between that definition and the one used in the IRO Constitution.<sup>42</sup> The obvious links between the two definitions and the explicit references during the Ad Hoc Committee's discussions to the interpretative precedents created under the IRO show the context in which the 1951 Convention definition was written and in which it must be read.

The *travaux préparatoires* thus contain no suggestion or hint of an intention that the standard of eligibility under the 1951 Convention definition was to be narrower than that which prevailed under the IRO. On the contrary, the expressed intention of the Ad Hoc Committee "to provide at least as much protection to refugees" as previous international instruments<sup>43</sup> shows that the definition in the 1951 Convention is to be interpreted in a manner similar to that adopted for the IRO Constitution, *i.e.*, as requiring no more than that the applicant give a plausible and coherent account of why he or she fears persecution.<sup>44</sup>

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origin, had valid reasons for rejecting repatriation.

IRO General Council, Fifth Session, Summary Record GC/SR/70, Annex at 9.

<sup>42</sup> The representatives of France and Italy even expressed the view that the Draft Convention definition was too similar to the provisions of the IRO Constitution and in following the IRO definition too closely it was *unduly restrictive*. Consequently, both countries pleaded for a broader definition (see U.N. Doc. E/1703(Corr. 1), E/1703/Add.2-7, and U.N. Doc. E/AC.32/L.40 (Memorandum by the Secretary-General) of 10 August 1950).

<sup>43</sup> Report, U.N. Doc. E/1618 at 37.

<sup>44</sup> For a description of the application of the IRO definition during this period, see L.W. Holborn, *The International Refugee Organization, Its History and Work—1946 to 1952* (1956) at 210.

### C. UNHCR Guidelines, Prepared For And At The Request Of States, Provide The International Standard For Applying The Term "Well-Founded Fear."

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, September 1979) was prepared at the request of States members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments.<sup>45</sup> The *Handbook* is based on UNHCR's experience, including the practice of States in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over the last quarter of a century.<sup>46</sup> It has since been widely circulated and approved both by governments<sup>47</sup> and in many judicial decisions.<sup>48</sup>

The phrase "well-founded fear of being persecuted" has been explicated in the *Handbook* in the following way:

The phrase "well-founded fear of being persecuted" is the key phrase of the definition. . . . Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evalu-

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<sup>45</sup> See Report of the 28th Session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/549 (1977) at para. 53.6(g).

<sup>46</sup> *Handbook*, at 1.

<sup>47</sup> Report of the 30th Session, UN Doc. A/AC.96/572 (1979) at paras. 68, 72(1)(h); Report of the 31st Session UN Doc. A/AC.96/588 (1980) at para. 36.

<sup>48</sup> Both U.S. courts and the BIA have turned to the *Handbook* for guidance in the interpretation of the 1967 Protocol. *McMullen v. INS*, 658 F. 2d 1312 (9th Cir. 1981); *Carvajal-Munoz v. INS*, 743 F. 2d 562 (7th Cir. 1984); *Ananeh-Firempong v. INS*, 766 F. 2d 621 (1st Cir. 1985). *Matter of Rodriguez-Palma*, 17 I. & N. Dec. 465 (BIA 1980); *In re Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

ation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin. (para. 37)

To the element of fear—a state of mind and a subjective condition—is added the qualification “well-founded.” This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration. (para. 38)

Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences—in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified. (para. 41)

As regards the objective element, it is necessary to evaluate the statements made by the applicant. . . . A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility. In general, the applicant's

fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there. (para. 42)

Consistently with the *travaux préparatoires*, the *Handbook* emphasizes that the fear of the applicant and not the hypothetical likelihood of future events is the central element of the refugee definition. *See also* paras. 40, 43.

The *Handbook* goes on to address the process of determining refugee status. It recognizes the general legal principle that the burden of proof lies on the person submitting a claim, but recalls that an applicant for refugee status is normally in a particularly vulnerable situation which may expose him or her to serious difficulties in submitting his or her case to the authorities (para. 190).

. . . In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (para. 196)

In view of the difficulty of proof inherent in the special situation in which applicants for refugee status find them-



selves, evidentiary requirements ought not be applied too strictly (see paragraphs 197, 203 and 204).

The rationale for this humanitarian standard is obvious. The harm done to one erroneously excluded from refugee status is analogous to that caused to the wrongfully convicted;<sup>49</sup> the likelihood of its eventuating is increased by unrealistic standards of proof. The objective of protection is better served by an approach which recognizes the gravity of the harm consequent on erroneous decisions, and of the special situation of the applicant. This conforms to tradition in United States law and practice where the standard of proof in legal proceedings has been adjusted to balance the interests of the state and the consequences to the individual of factual error. *Re Winship*, 397 U.S. 358, 379 (1970).

Thus, in procedures for determining refugee status, the standard of proof should adequately reflect the potentially disastrous consequences for the applicant of an erroneous determination, as well as the difficulties he or she may have in proving them. The need to facilitate the task of applicants for refugee status in presenting their cases is recognized in the practice and in court decisions of States Parties to the 1951 Convention and/or the 1967 Protocol.<sup>50</sup>

51, 52

<sup>49</sup> Cf. Bayles, 'Principles for Legal Procedure', 5 *Law and Philosophy* (1986) at 35-57.

<sup>50</sup> The law and practice in Canada is described in the brief submitted by the UNHCR in *INS v. Stevic*, *supra*, at 23-34. The general approach described therein is further illustrated by *Re Naredo and Minister of Employment and Immigration*, (1981) 130 D.L.R. (3d) 752, 753, where the Canadian Federal Court of Appeal held that the Board had erred in requiring applicants to show that they *would* be subject to persecution. Heald, J., observed that "...the statutory definition required only that [the applicants] establish a 'well-founded fear of persecution'.

**D. Any Interpretation Of The Term "Well-Founded Fear Of Persecution" Which Requires A Showing That The Applicant Is More Likely Than Not To Become The Victim Of Persecution Is Inconsistent With The International Standard Adopted By Congress.**

To require asylum applicants to show a "clear probability of persecution" could lead to results which would not be in conformity with the 1951 Convention and the 1967 Protocol. The term "clear probability" is generally

The test imposed by the Board is a higher and more stringent test than that imposed by the statute. . . ."

<sup>51</sup> The reasoning adopted by the United Kingdom House of Lords in the case of *Fernandez v. Government of Singapore*, an extradition case, is itself striking and compelling authority for the rejection of the balance of probabilities test in asylum cases. ([1971] 1 W.L.R. 987; Goodwin-Gill, *The Refugee in International Law* (1983), at 22-24):

[T]he phrase ["balance of probabilities"] is inappropriate when applied not to ascertaining what has happened, but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a court is required, either by statute or at common law to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens. . . . The degree of confidence that the events specified will occur which the court should have to justify refusal to return the fugitive . . . should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting and on the other hand of refusing, the return of the fugitive if the court's expectation should be wrong.

*Ibid.* at 993-4, (emphasis supplied.) Practice in asylum cases before adjudicators and the Immigration Appeal Tribunal in the United Kingdom now reflects this standard. See *Enniful v. Secretary of State*, Immigration Appeal Tribunal, (United Kingdom, October 22, 1984); *R. v. Secretary of State, ex parte Jeyakumaran*, High Court, CO/290/84 (United Kingdom, June 28, 1985).

<sup>52</sup> The law and practice in the Federal Republic of Germany is described in the brief submitted by the UNHCR in *INS v. Stevic*, *supra* at 24.



taken to mean that the fact in question must be more than probably true, *i.e.*, more likely than not. *INS v. Stevic*, 467 U.S. 407 (1984). However, to require of an applicant for asylum to prove that a future possibility of persecution is "more likely than not" results in a standard more stringent than the term "well-founded fear" as that phrase is used in the 1951 Convention.

First, such a standard misconstrues the intent of the drafters of article 1 of the 1951 Convention. According to their explanation, as shown above, the term "well-founded fear of being persecuted" means that an applicant for refugee status need only be able to show good reason why he or she fears persecution.<sup>53</sup> Under this definition, the objective circumstances must be evaluated with reference to an applicant's subjective fear of persecution in order to determine whether there is good reason for that fear. The clear probability standard as interpreted in *Stevic*, if applied to asylum, suggests that fear is not well-founded unless it is based upon a more than even chance that the event feared would actually happen. But this is inconsistent with the ordinary meaning of the words and contrary to human experience, as illustrated by an acknowledged authority on refugee law, Professor A. Grahl-Madsen, who has written:

... Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote "labour camp" or that people are arrested and detained for an indefinite period on a slightest suspicion of political non-conformity. In such a case it would only be too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of being persecuted" upon his eventual return. It cannot—and should not—be re-

<sup>53</sup> See *Report*, U.N. Doc. E/1618, *supra*, Annex II at 39.

quired that an applicant shall prove that the police have already knocked on his door.<sup>54</sup>

Second, the "clear probability" standard would deprive the subjective term "fear," which is a fundamental element of the refugee definition in the 1951 Convention and the 1967 Protocol, of its meaning. The term "fear" was introduced by the drafters of the 1951 Convention precisely in order to ensure that the subjective apprehensions of the applicant for refugee status in relation to the objective conditions in his or her country of origin are taken fully into account. This possibility would obviously be excluded if regard were had only to whether or not certain events forming the basis of the applicant's justified fear are *in fact* likely to occur. "Good reason" for fear, rather than proof of a particular degree of probability of being persecuted, is all that is required by international law.

Third, the "clear probability" standard could result in the denial of asylum to persons who qualify for it by ignoring the difficulties which genuine refugees often face in producing particularized evidence. It demands too much of the asylum-seeker and pays too little attention either to the gravity of the harm likely to be done to the refugee who is denied asylum, or to the essentially future-oriented

<sup>54</sup> Grahl-Madsen, 1 *The Status of Refugees in International Law*, 180 (1966). The Petitioner similarly relies on this treatise in its opening Brief. INS Brief at 30. But the paragraphs cited by the Petitioner simply establish what no one disputes, *viz.*, that a showing of likely persecution is *sufficient* to establish a well-founded fear of persecution. The issue in this case is whether such a showing is also *necessary*. Grahl-Madsen, in the passage quoted herein, plainly implies that it is not. In addition, the principal German case referred to by Grahl-Madsen in the Petitioner's citation only states that an applicant has "good reasons to fear persecution within the meaning of the Geneva Refugee Convention, if in a reasonable evaluation of his case, he cannot be expected to remain in his home country" (translation from the German by UNHCR). The other cases cited in the treatise are consistent with this approach.

nature of the essay in hypothesis which lies at the heart of a well-founded fear of persecution. In using the term "well-founded fear of being persecuted", the framers of the 1951 Convention adopted a definition which corresponds to the practical realities of the refugee situation and reflects the state of uncertainty and anxiety that often precipitates a refugee's decision to flee.

The Petitioner argues that the "clear probability" standard can be applied with some flexibility, and that it is indistinguishable from a "well-founded fear of persecution". INS Brief at 28, 31. But Petitioner's Brief in both this case and *Stevic*, and the decisions of the Board of Immigration Appeals and of some courts, show that the differences between the two standards are by no means negligible. Indeed, the "clear probability" standard has a tendency to escalate into a requirement of near certainty. For example, one of the forms of evidence that would, according to the Petitioner's Brief in *Stevic*, substantiate a "clear probability" of persecution, is "evidence of persecution of all or virtually all members of a group or class to which the alien belonged. . . ."<sup>55</sup> Clearly, an applicant might have a well-founded fear of being persecuted long before "all or virtually all" of the members of his group had actually become the victims of persecution. See also INS Brief herein at 12 (asylum available to those who "face persecution"). The standard, if interpreted as suggested by the Petitioner, approaches a requirement of near certainty and *a fortiori* would be inconsistent with the 1967 Protocol. See also, *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3rd Cir. 1983) (requiring "compelling reasons" and "conclusive proof"); *In re Dunar*, 14 I. & N. Dec. 310 (1973).

Petitioner places substantial weight upon the decision in *re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985),

<sup>55</sup> Petitioner's Brief in *INS v. Stevic* at 9, 23 and fn. 25 and 32.

in which the Board of Immigration Appeals remarked that "as a practical matter the showing contemplated by the phrase 'a well-founded fear' of persecution converges with the showing described by the phrase 'a clear probability' of persecution". The Board reiterated its view that the standards for asylum and withholding of deportation converged; a likelihood of persecution, a clear probability of persecution, or that persecution was more likely than not, were not meaningful distinctions in practice. But most courts addressing the issue have had little difficulty in distinguishing the two standards and in giving meaningful content to the more generous term as suggested herein. *Carvajal-Munoz v. INS*, 743 F. 2d 562 (7th Cir. 1984); *Youkhanna v. INS*, 749 F. 2d 360 (6th Cir. 1984); *Guevara-Flores v. INS*, 786 F. 2d 1242 (5th Cir. 1986); *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984). *Contra*, *Sotto v. INS*, 748 F. 2d 832 (3rd Cir. 1984).

The Petitioner complains that the well-founded fear standard as articulated by the court below does not correspond to any defined numerical level of probability. INS Brief at 31. No statistical definition is, however, appropriate to determine the reasonableness of an applicant's fear, given the inherently speculative nature of the exercise. The requisite degree of probability must take into account the intensity of the fear, the nature of the projected harm (death, imprisonment, torture, detention, serious discrimination, etc.), the general history of persecution in the home country, the applicant's personal experience and that of his or her family, and all other surrounding circumstances.<sup>56</sup> Thus, the court below was

<sup>56</sup> *Bolanos-Hernandez v. INS*, *supra*. This approach is illustrated by a recent decision of the Higher Administrative Court, Hamburg, decision of 11 April 1983—OVG Bf. V 30182, *InfAuslR* 1983, p. 187, also published in Marx, 1 *Asylrecht* (1984) at 237-8: "In case of serious sanctions such as death penalty or long-term imprisonment or severe torture, it can be sufficient that the possibility of these sanctions being



correct to conclude that the well-founded fear standard involves less than a clear probability, focusing not on likelihood of an event but reasonableness of fear:

The term "clear probability" requires a showing that there is a greater than fifty percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

Pet. App., 9a. The UNHCR respectfully urges this Court to affirm this articulation of the appropriate standard.

### CONCLUSION

For the foregoing reasons, the Office of the United Nations High Commissioner for Refugees would respectfully urge the Court to affirm the holding of the Court of Appeals in the decision below.

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applied is *not remote*." (Translation by UNHCR) (emphasis supplied). See also, *Benipal v. Ministers of Foreign Affairs and Immigration*, Action No. 878/83, 993/83, 1016/83 (High Court of New Zealand, Nov. 29, 1985):

"Clearly there are subjective and objective considerations in the application of the definition to the facts. While as a matter of convenience it is useful to distinguish between the two ingredients, it can lead to error to regard them as separate and independent elements which can be considered in isolation. If fear exists, the issue whether that fear is well-founded cannot be divorced from the fear itself: it is *in relation to the fear* that the issue of "well-founded" must be decided, not in relation to anything else. . . ." (at 228)

Respectfully submitted,

SHAMSUL BARI, Esq.  
GUY S. GOODWIN-GILL, Esq.  
JOACHIM HENKEL, Esq.  
IVOR JACKSON, Esq.

RALPH G. STEINHARDT  
720 20th Street, N.W.  
Washington, D.C. 20052  
(202) 676-5739

United Nations High Commissioner for Refugees

Attorney for Amicus Curiae

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE,  
*Petitioner,*

v.

LUZ MARINA CARDOZA-FONSECA,  
*Respondent.*

On Writ Of Certiorari To  
The United States Court Of Appeals  
For The Ninth Circuit

**BRIEF OF AMICI CURIAE  
THE AMERICAN CIVIL LIBERTIES UNION;  
THE POLITICAL ASYLUM PROJECT OF THE  
AMERICAN CIVIL LIBERTIES UNION FUND  
OF THE NATIONAL CAPITAL AREA;  
IMMIGRANT AND REFUGEE RIGHTS PROJECT  
SAN FRANCISCO LAWYERS' COMMITTEE  
FOR URBAN AFFAIRS  
IN SUPPORT OF RESPONDENT**

*Counsel:*

ROBERT N. WEINER  
SHELLEY R. SLADE  
ERIC R. BIEL  
ARNOLD & PORTER  
1200 New Hampshire  
Avenue, N.W.  
Washington D.C. 20036  
(202) 872-6790

*Attorneys for Amici Curiae*

July 14, 1986

*Counsel of Record:*

CAROL LESLIE WOLCHOK  
122 Maryland Avenue, N.E.  
Washington, D.C. 20002  
(202) 543-4651

BURT NEUBORNE  
LUCAS GUTENTAG  
JACK NOVAK  
132 West 43rd Street  
New York, N.Y. 10036  
(212) 944-9800

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INTEREST OF AMICI\*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The American Civil Liberties Union Fund of the National Capital Area (ACLU-NCA) is an affiliate of the ACLU and operates the Political Asylum Project. Both the ACLU and the ACLU-NCA have long been actively involved in issues concerning immigration and the rights of aliens. In particular, the Political Asylum Project of the ACLU-NCA is concerned with the interpretation and implementation of the

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\* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.



Refugee Act of 1980, owing to its representation of aliens seeking political asylum before administrative and judicial bodies.

The Immigration and Refugee Rights Project is a special project of the San Francisco Lawyers' Committee for Urban Affairs. The Lawyers' Committee is the Northern California affiliate of the National Lawyers' Committee for Civil Rights Under Law. The Immigration and Refugee Rights Project is involved extensively in the recruitment and training of attorneys willing to provide pro bono representation to political asylum applicants. The Project is dedicated to ensuring through domestic and international law that the rights of persons seeking asylum are protected.

At issue in this case is the determination of the standard which must

be satisfied by an alien seeking political asylum in order to avoid deportation. The standard adopted by this Court is critical, not only to the longstanding tradition in American jurisprudence of protecting individual liberties from abuse, but particularly to aliens who face severe deprivations of liberty both from deportation itself and from what can and often does occur to them thereafter. Because the ACLU, the Political Asylum Project, and the Immigration and Refugee Rights Project believe the issue here was correctly decided by the United States Court of Appeals for the Ninth Circuit, amici submit this brief in support of respondent and urge affirmance of the judgment below.

SUMMARY OF ARGUMENT

As the briefs of respondent and other amici demonstrate, the intent of the Refugee Act of 1980 was to conform U.S. law to international norms by adopting the internationally recognized "well-founded fear" standard for refugee and asylum determinations. In the event this Court finds the legislative intent regarding the meaning of the "well-founded fear" standard to be unclear, however, the analyses traditionally used by the Court for discerning the appropriate standard of proof in other types of legal proceedings should be applied.

One analysis entails an adjustment of the standard of proof to shift the risk of an erroneous decision away from the party with disproportionately high stakes in the outcome. A second

analysis involves a lowering of the standard of proof to favor the party facing substantial evidentiary difficulties in proving future harm.

Employment of these approaches is appropriate in the asylum context owing to the severe impact that an erroneous denial of asylum would have on the applicant, the increased risk of a wrongful denial caused by cultural, language, and evidentiary barriers, and the practical obstacles to establishing future harm.

Consistent with its prior analyses, the Court should interpret the "well-founded fear" standard to reflect these concerns, by requiring a showing such as a "reasonable possibility" of persecution, or a "good reason" to fear persecution. Accordingly, the Court

should affirm the decision of the Court of Appeals for the Ninth Circuit.

## ARGUMENT

### I. INTRODUCTION

The Refugee Act of 1980 establishes for the first time a statutory asylum provision for individuals who are unwilling or unable to return to their countries of origin because of "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1982). In passing this Act, Congress incorporated the internationally-recognized definition of refugee into United States law and extended protection to persons who can prove that their fear of persecution is

"well-founded." In this case, the Court must decide what showing asylum applicants are required to make in order to satisfy this burden.

The Court suggested an answer to this question in Immigration and Naturalization Service v. Stevic, 467 U.S. 407 (1984). While the Court found that applicants for withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (1982), had to show a "clear probability" of persecution, it suggested that "a more moderate" interpretation of the "well-founded fear" standard used in section 208 asylum proceedings would be:

"so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that



persecution is a  
reasonable possibility."

467 U.S. at 424-25 (emphasis supplied).

The Government here rejects this "moderate" interpretation and argues that the "well-founded fear" standard for asylum is synonymous with the "clear probability" standard.

As demonstrated by the briefs of respondents and other amici, the language and legislative history of the Refugee Act do not support the Government's position. By codifying the "well-founded fear" standard, Congress did not intend that asylum applicants prove a clear probability of persecution in order to obtain asylum. Rather, it sought to establish a more generous and protective standard, consistent with international norms. Even if the congressional intent were not so explicit, however, and it were necessary for this Court to

ascertain the asylum applicant's proper standard of proof, the end result would be the same and a more protective standard would be required. The focus of this brief is on the analysis the Court should use in the event it finds the legislative intent unclear.

The determination of the proper standard of proof "is the kind of question which has traditionally been left to the judiciary to resolve." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 284 (1966). When called upon to determine the proper standard of proof, this Court has repeatedly utilized an analytical approach designed to minimize injury to those interests that society deems to be most important. That approach involves both an assessment of the risk of error in the fact-finding process and a

determination of the potential injury to each party from an incorrect determination. In addition, the Court has considered the difficulty of making a particular showing in cases that present significant evidentiary problems.

Applying these analytical processes, courts have consistently adjusted the standard of proof to favor the party having the most at stake and the party bearing substantial evidentiary burdens.

As this brief demonstrates, the Court's traditional approach dictates an interpretation of the "well-founded fear" standard that reflects the grave consequences of an erroneous denial of asylum.<sup>1</sup> Unlike the "clear probability"

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<sup>1</sup> In I.N.S. v. Stevic, the Court held that the statutory language (that provided for withholding of deportation under section 243(h) if the applicant "would be subject to persecution") and the relevant legislative history

[Footnote continued on next page]

test urged by the Government, an interpretation such as "reasonable possibility" of persecution or a "good" or "valid reason" to fear persecution takes into account the difficulty of proving that an applicant's fear of persecution is well-founded. The decision of the Ninth Circuit is consistent with this approach and promotes our national commitment, expressed in the Refugee Act, to "welcom[e] homeless refugees to our shores." S. Rep. No. 256, 96th Cong., 1st Sess. 1 (hereinafter "Senate Report to the Refugee Act").

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[Footnote continued from previous page] compelled that applicants for withholding show a "clear probability" of persecution. The Court in Stevic consequently was not called upon to assess the risk of error and balance the interests of the parties.

II. THE COURT'S TRADITIONAL APPROACH  
TO DETERMINING THE PROPER STANDARD  
OF PROOF DICTATES THAT "WELL-FOUNDED  
FEAR" BE INTERPRETED TO REQUIRE A  
"REASONABLE POSSIBILITY" OF  
PERSECUTION OR A SIMILAR SHOWING

Use of a more protective standard where especially significant interests are in jeopardy is well-accepted. This Court has repeatedly engaged in the type of risk analysis described above when setting the standard of proof absent clear legislative direction. It has employed this analysis over a broad span of time, Schneiderman v. United States, 320 U.S. 118 (1943); Santosky v. Kramer, 455 U.S. 745 (1982), and in a variety of factual contexts, extending from immigration, Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966), to civil commitment, Addington v. Texas, 441 U.S. 418 (1979), to sovereign water rights, Colorado v. New Mexico, 467 U.S. 310 (1984). In some of these cases

the important interests justifying adjustment of the standard of proof have been constitutional in dimension, e.g., Addington, 441 U.S. 418 (1979), while in others they have not, e.g., Nishikawa v. Dulles, 356 U.S. 129 (1958). The same type of analysis that the Court employed in this line of cases is appropriate here.

A. The Interpretation of the  
"Well-Founded Fear" Standard  
Should Reflect the Grave  
Consequences of an Erroneous  
Denial of Asylum

1. The Standard of Proof  
Allocates the Risk of  
Error Based on the  
Interests Each Party Has  
at Stake

Factfinding in any judicial or administrative proceeding is imperfect. Errors are inevitable. The standard of proof allocates the risk of such errors between the parties to the proceeding. Justice Harlan explained this function in



his well-known concurrence to In re Winship, 397 U.S. 358 (1970):

"In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

"The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of

factual errors that result in convicting the innocent."

397 U.S. at 370-71 (Harlan, J., concurring).

How courts allocate the risk of error in any particular context depends on the impact that a factual error will have on each of the parties and on society as a whole. Choices of the proper standard of proof "reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations." Id. at 370. As Justice Rehnquist has noted, the Court has apportioned the burden of proof "to minimize error as to those interests which we consider to be most important." Santosky v. Kramer, 455 U.S. 745, 786 (1982) (Rehnquist, J., dissenting).

For example, in criminal cases "society imposes almost the entire risk

of error upon itself" because the interests of a criminal defendant "are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

Addington v. Texas, 441 U.S. 418, 423-24 (1979). By contrast, the "preponderance of the evidence" standard employed in most civil actions divides "the risk of error in roughly equal fashion" between the parties, id. at 423, reflecting the judgment that a mistaken determination against either is equally undesirable.

This Court has weighed the risks at stake and mandated standards diverging from those distributing the risk of error equally where, as here, the consequences of error would be particularly grievous for one party. In Woodby, the Court considered the significant harm to the

individual of an erroneous deportation in rejecting the government's argument that the Immigration and Naturalization Service need prove deportability only by a "preponderance of the evidence." 385 U.S. at 284-85.<sup>2</sup> The Court emphasized:

"To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic

<sup>2</sup> For purposes of risk analysis, the "preponderance of the evidence" standard may be viewed as a functional equivalent of the "clear probability" standard. Both standards require proof that facts are probable, i.e., more likely than not. See I.N.S. v. Stevic, 467 U.S. at 424 (the question presented by the clear probability standard is "whether it is more likely than not that the alien would be subject to persecution"); Black's Law Dictionary (rev. 5th ed. 1979), at 1064 ("preponderance of evidence" is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not").

deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."

385 U.S. at 285 (citation omitted) (emphasis added). The Court's recognition that these stakes, which are less substantial than those of asylum applicants, mandated application of a standard more protective than "preponderance of the evidence," was not predicated on the existence of a constitutional right. See Vance v. Terrazas, 444 U.S. 252, 266-67 (1980). Rather, it reflected the Court's balancing of the public and private interests which could be affected by an erroneous finding of deportability.

Applying a similar analysis, the Court in Addington v. Texas, 441 U.S. 418 (1979), rejected a standard of proof that did not adequately protect an individual from the risk of erroneous involuntary commitment for mental illness. The Court first analyzed the interests at stake in such a proceeding. The State, the Court found, had legitimate concerns in providing care for the mentally ill and in protecting the community. Id. at 426. However, in the Court's view, the State had no interest in erroneously confining individuals who were neither mentally ill nor dangerous:

"Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in



such commitment  
proceedings."

Id. at 426.

On the other hand, the individual's stakes were substantial. A person involuntarily committed is deprived of his liberty and indelibly stigmatized as a mental patient. Id. at 425-26. Increasing the State's burden of proof, the Court stated, "is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." Id. at 427. In the Court's judgment:

"The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater

than any possible harm to the state."

Id. at 427 (emphasis supplied). Given the risks involved, the preponderance standard did not sufficiently protect the individual. Consequently, the Government's burden was increased.

Most recently, in Santosky v. Kramer, 455 U.S. 745 (1982), this Court overturned a New York statute that empowered the State to terminate parental rights upon the State's showing by a "fair preponderance of the evidence" that the child was "permanently neglected." New York Family Court Act § 622 (McKinney 1975 and Supp. 1981-82). Again applying a risk analysis, the Court adapted the factors outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), for determining the requisites of procedural due process in order to ascertain the appropriate standard of proof. The Court in Mathews

had identified the relevant factors as the individual's interests, the risk of erroneous factfinding adverse to the individual, and the Government's interests. Id. at 335.

The Court first noted that the interests of the natural parents in "the care, custody, and management of their child," 455 U.S. at 753, were "plain beyond the need for multiple citation." Id. at 758, quoting Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981). The Court emphasized that a decision terminating parental rights is "final and irrevocable," 455 U.S. at 759 (emphasis in original); once extinguished, the parents' interests can never be revived.

Second, the Court considered whether the preponderance standard "fairly allocates the risk of an

erroneous factfinding" between the parents and the State. The Court pointed to numerous factors that "combine to magnify the risk of erroneous factfinding" to the parents. Id. at 762. That risk was high, in the Court's view, because of imprecise legal standards, unusual discretion accorded the decisionmaker to rule against the parents, the possibility of cultural or class bias, and unequal litigation resources. Id. at 762-63. When "[c]oupled with a 'fair preponderance of the evidence' standard," the Court found, "these factors create a significant prospect of erroneous termination." Id. at 764. The Court concluded that increasing the burden of proof on the State would diminish the risk of error.

Third, the Court identified two governmental interests: promoting the

welfare of the child and reducing the costs of termination proceedings. Id. at 766. A standard of proof more stringent than the preponderance standard, the Court held, was consistent with the child's welfare and would not impose substantial fiscal or administrative costs on the State. Id. at 766-67.

Given the disproportionate interests at stake and the great danger of factual errors against the parents, the Court rejected the preponderance standard specified in the statute.

Woodby, Addington, and Santosky illustrate this Court's repeated use of a protective standard of proof in order to allocate the risk of an erroneous factual determination away from the party with disproportionately high stakes. The Court has employed this analysis in a long line of cases involving both

constitutional and non-constitutional interests.<sup>3</sup> In the event that the Court considers congressional intent on the meaning of "well-founded fear" to be unclear, this analysis should guide the Court in determining the proper showing by applicants for refugee status.

2. In an Asylum Adjudication, the Applicant's Stakes Outweigh the Government's, and the Risk of an Erroneous Decision Falls Heavily on the Applicant

Application of risk analysis to asylum proceedings can yield but one result: a standard of proof such as

<sup>3</sup> See, e.g., Colorado v. New Mexico, 467 U.S. 310, 315-16 (1984); Herman & MacLean v. Huddleston, 459 U.S. 375, 387-90 (1983); California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 92-93 (1981); Fedorenko v. United States, 449 U.S. 490, 505 (1981); Mullaney v. Wilbur, 421 U.S. 684, 700-02 (1975); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51-52 (1971); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Schneiderman v. United States, 320 U.S. 118, 139, 158-59 (1943).



reasonable possibility, a standard more protective of asylum applicants than that urged by the Government. The stakes of the individual applicant are substantial, the sources of potential error adverse to her are considerable, and the government's interests are comparatively insignificant. The approach employed by the Ninth Circuit below properly "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington, 441 U.S. at 423.

a. The Individual's Stakes

An asylum applicant's stakes in a fair and accurate adjudication of her claim are extremely compelling. The Court has recognized that deportation may involve a "loss . . . of all that makes life worth living," Ng Fung Ho v. White, 259 U.S. 276, 284 (1922), and impose

"drastic deprivations," Woodby, 385 U.S. at 285. A mistaken denial of asylum is even more devastating. It can lead to the loss of life itself, to torture, to imprisonment, to discrimination, or to numerous other forms of persecution. Decisions granting or denying of asylum are unique. As one commentator has noted: "No other adjudication in our legal system potentially subjects the individual to torture or summary execution." Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond," 44 U. Pitt. L. Rev. 165, 190 (1983).

Moreover, an adverse asylum determination, like the termination of parental rights in Santosky, is "final and irrevocable" if affirmed on appeal. Once delivered to her persecutors, the applicant has little hope of escaping to

renew the quest for asylum. The gravity of the applicant's interests thus weighs heavily against applying any standard which would have the applicant and the Government "share the risk of error in roughly equal fashion." Addington, 441 U.S. at 423.

b. The Risk of Error

Applicants for asylum are an especially vulnerable class of litigants. To begin with, the applicant bears the burden of proving to the trier-of-fact that her fear of persecution is indeed well-founded. However "well-founded fear" is construed, the difficulties of meeting this burden and of proving from afar the future actions of a foreign Government or other potential persecutors are formidable. See Section II.B.1., infra.

This burden is compounded by the additional practical difficulties that an applicant faces in documenting her case. Individuals fleeing persecution are often lucky to escape with their lives. As stated by the United Nations High Commissioner for Refugees: "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents . . . ." United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 196 (Geneva 1979) (hereinafter "UNHCR Handbook"). She has no power to subpoena or depose her alleged persecutors; even if she did, "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of

persecution." Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1285 (9th Cir. 1984). As a result, many of the applicant's statements simply may not be susceptible to proof. Often the only evidence she can offer is her personal testimony.

In addition to these problems, many individuals must pursue their asylum claims without benefit of counsel. Cultural, language, and other barriers further increase the risk of a wrongful denial. The United Nations High Commissioner for Refugees has noted:

"It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign

country, often in a language not his own.

. . .  
"A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case."

UNHCR Handbook ¶¶ 190, 198.

By contrast, the Government can rely upon the full resources of the I.N.S. at nearly every stage of the proceedings. As this Court found in Santosky v. Kramer, such unequal litigation resources may amplify the risk of errors against the weaker party. 455 U.S. at 763.

In sum, the deck is stacked against the applicant. The chance of an erroneous grant of asylum is minimal,



whereas the chance of an erroneous denial is substantial.

c. The Government's Interests

The Government has several interests in any asylum proceeding: fulfilling our international obligation to shelter refugees from persecution; ensuring accurate asylum determinations; and maintaining the efficiency of the administrative process by minimizing the time and expense of asylum proceedings.

The Government's interests need not conflict with those of the asylum applicant. Just as the Government had no interest in an erroneous involuntary commitment in Addington, it has no interest in erroneously denying asylum to a deserving applicant and returning her to face persecution. To the contrary, the Refugee Act of 1980 embodies a national commitment to protect refugees.

See Senate Report to the Refugee Act, at 1. Since the clear probability standard advocated by the Government would likely increase the erroneous denials of asylum, application of that standard would frustrate the Government's primary interest to "respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a).

Furthermore, a standard less than clear probability will not impose greater fiscal and administrative burdens on the Government. Indeed, the Government has made no showing that the more protective standards now applied in several circuits have increased its burdens. The procedures for determining asylum claims are already in place and need not be altered. All that changes is how the fact-finder evaluates the evidence

presented.<sup>4</sup> As this Court recognized in Santosky, modifying the standard of proof "reduce[s] factual error without imposing substantial fiscal burdens upon the State." 455 U.S. at 767 (citations omitted).

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<sup>4</sup> See In the Matter of G, No. A26306224 (decided December 17, 1985), attached as Appendix A. A review of this decision of an immigration judge reveals the fallacy of the Government's argument that applying two standards to one set of facts is administratively cumbersome. The decision demonstrates that immigration judges are able to differentiate between the two standards and apply each standard separately to the facts presented. As in civil cases which allege several alternative causes of action, or criminal prosecutions which present multiple charges (some of which involve affirmative defenses), the structure of the hearing itself is not altered by the requirement that the finder of fact apply different legal tests simultaneously. Thus, there is no need that the asylum hearing be separate from the hearing in which withholding of deportation relief is considered.

3. The Balance of Interests and the Risk of Error in an Asylum Proceeding Dictate a Showing Such as Reasonable Possibility

In sum, applying the same analysis this Court has employed to allocate the burden of proof in other contexts -- assessing the interests of the applicant and the Government as well as the risk of error in the particular proceeding -- compels the conclusion that the clear probability standard is not appropriate in asylum proceedings. The interests of asylum applicants are momentous. By contrast, an error adverse to the Government would not seriously impair its interests. Given the disproportionate interests at stake, and the high risk of error, it would be completely inappropriate to distribute the risk evenly between the Government and the applicant, or to tilt the scale toward

the Government as the clear probability standard does.

A more protective standard such as reasonable possibility would better reconcile the interests of the parties. It would better reflect the social costs of an erroneous decision. And it would better accommodate the values that Congress and our society as a whole have identified as important. Consistent with its prior decisions, this Court should mandate such a standard in asylum proceedings.

B. The Interpretation of the "Well-Founded Fear" Standard Should Reflect the Difficulty Asylum Applicants Face in Establishing the Possibility of Persecution in the Future

1. This Court and Other Courts Frequently Have Relaxed the Evidentiary Burden on a Party Who Must Establish Future Harm

Future events are less susceptible to proof than those past or present, particularly where a litigant is called upon to predict the future behavior of other persons. The inquiry frequently devolves into a subjective judgment by the trier-of-fact. Consequently, a party bearing the burden of proving that she faces serious future harm has a truly difficult task.

This Court and other courts have recognized this burden and have relaxed the standard of proof where



constitutional or statutory benefits or protections depend upon showing a risk of future harm. The Court in Addington v. Texas, for example, considered the State's burden of showing mental illness and future dangerousness in civil commitment proceedings. While, as noted above, the balance of interests at stake in that case precluded imposition of a preponderance standard (or less) on the State, the Court also found that the difficulties of proof made a reasonable doubt standard wholly impractical. 441 U.S. at 429-30, 432. The Court therefore adopted the intermediate standard of "clear and convincing evidence" to accommodate these evidentiary problems.

The Court in Addington noted that a commitment proceeding differed from a criminal prosecution or a juvenile

delinquency hearing, where "the basic issue is a straightforward factual question -- did the accused commit the act alleged?" Id. at 429. In contrast, facts in a commitment proceeding "represent only the beginning of the inquiry." Id. Whether an individual needs confinement rests on a subjective assessment of the meaning of those facts by expert psychiatrists and psychologists. As the Court noted: "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." Id. at 430. The standard of proof in a commitment proceeding, the Court held, had to reflect these evidentiary obstacles to proving future behavior.<sup>5</sup>

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<sup>5</sup> In Santosky v. Kramer, this Court rejected use of the reasonable doubt [Footnote continued on next page]

In Ethyl Corporation v.

Environmental Protection Agency, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976), the Court of Appeals found it necessary to adjust the standard of proof to allow for the difficulties of predicting future harm. The Court held that the EPA could regulate certain products under a statutory provision covering goods that "will endanger the public health or welfare," even though scientific data revealed only a "significant risk" of harm. Id. at 20. The Court rejected the petitioner's contention that the Act required the EPA

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[Footnote continued from previous page] standard of proof in favor of the clear and convincing evidence standard for parental rights termination proceedings. The Court in Santosky held that it was "difficult to prove to a level of absolute certainty" a "lack of parental motive [and] absence of affection," and therefore the Court found it necessary to lower the standard of proof. 455 U.S. at 769.

to establish a probability of injury. Such an overly restrictive standard was unrealistic, given that "[q]uestions involving the environment are particularly prone to uncertainty," and that "speculation, conflicts in evidence, and theoretical extrapolation typify [regulators'] every action." Id. at 24. The Court held:

"[T]he public health may properly be found endangered both by a lesser risk of a greater harm and by a greater risk of a lesser harm. Danger depends upon the relation between the risk and harm presented by each case, and cannot legitimately be pegged to 'probable' harm, regardless of whether that harm be great or small . . . . [T]hese concepts 'necessarily must apply in a determination of whether any relief should be given in cases of this kind in which

proof with certainty is impossible.'" "

Id. at 18 (citation omitted). Ignoring these evidentiary difficulties would have exposed the public to dangers the statute was designed to prevent.

In Reserve Mining Company v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975) (en banc), the Eighth Circuit employed a similar analysis in interpreting a phrase from the Federal Water Pollution Control Act permitting injunctive relief against pollution hazards which "endanger . . . the health or welfare of persons." Id. at 527. The court construed "endanger" to require a showing of only a "reasonable" or "potential" danger. Id. at 528-29. The court held that since the likelihood of harm to the public health could rarely be shown by more than "acceptable but unproved medical theory," and since the

harm to be avoided -- cancer -- was particularly great, a "reasonable medical concern" justified an injunction under the statute. Id. at 529.

In Halperin v. Central Intelligence Agency, 629 F.2d 144 (D.C. Cir. 1980), the D.C. Circuit recognized that future harm is all the more difficult to predict when it involves the secret actions of a foreign government. In upholding the Government's broad interpretation of one of the national security exemptions to the Freedom of Information Act, which provides for non-production of documents upon a showing that documents "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods," the court explained:

" . . . any affidavit or other agency statement of threatened harm to national security will



always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual past harm . . .

In the present case, a stricter standard [than reasonable expectation] for the showing of potential harm could very seldom be satisfied . . ."

Id. at 149 (emphasis added).

Given the covert nature of the harm at issue, the Halperin court also held that it would be unrealistic to ask the Government to prove past instances of concrete harm in order to show a threat of future harm. Requiring a showing of past harm would undermine the very purpose of the statutory exemption, which was "to protect intelligence sources before they are compromised and harmed, not after." Id.

In each of these cases, the court acknowledged the practical obstacles to

establishing a threat of future harm, and reduced the evidentiary burden of the party charged with that obligation. The same approach should apply to asylum proceedings and yield the same result.

2. The Difficulties Applicants for Asylum Face in Establishing the Prospect of Future Persecution Warrants a Showing Such as Reasonable Possibility

Applicants for asylum face the truly onerous burden of proving that they have good reason to fear future persecution. Already saddled with the disabilities noted above -- unequal resources for litigation, inaccessibility of evidence, and cultural barriers -- they nonetheless must predict the actions of a foreign government, or individuals whom the foreign government is unwilling or unable to control. The secrecy that often veils these actions in repressive

regimes renders this task all the more difficult.

A court deciding whether an individual is mentally ill and dangerous at least can hear the testimony of those who have examined the individual. An agency making scientific judgments at least has amassed the raw data that it is called upon to interpret. An individual seeking asylum, however, frequently can present nothing comparable -- no testimony by representatives of the foreign government, no documents identifying her as a victim of future persecution. See Cardoza-Fonseca v. I.N.S., 767 F.2d 1448, 1453 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986); Carvajal-Munoz v. I.N.S., 743 F.2d 562, 574 (7th Cir. 1984).<sup>6</sup>

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<sup>6</sup> The decision attached as Appendix A vividly demonstrates the evidentiary  
[Footnote continued on next page]

Under these circumstances, to require a showing that future persecution is clearly probable is to impose an unrealistic and generally unattainable burden. It will undoubtedly remit to the arms of their oppressors individuals

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[Footnote continued from previous page] difficulties encountered by an asylum applicant in proving his case, and the significantly greater burden imposed by the "clear probability" standard in comparison with the more generous "well-founded fear" standard. In the case attached, the immigration judge found the applicant's detailed testimony regarding his abduction, interrogation, torture, and subsequent surveillance by the Salvadoran police to be consistent and truthful. Applying the "well-founded fear" of persecution standard, the judge granted the applicant asylum. However, in evaluating his claim for withholding of deportation under the stricter "clear probability" standard, the judge found that he had not satisfied his burden of demonstrating that future persecution upon return to El Salvador was "more likely than not." This decision illustrates that proving the likelihood of future persecution is nearly impossible in most situations, and conveys a sense of the substantial dangers faced by an applicant who cannot satisfy the onerous "clear probability" standard.

whose fear of persecution is indeed well-founded, but who cannot demonstrate their likely fate with the requisite certainty. That is not what Congress intended.

### III. CONCLUSION

The Refugee Act of 1980 rededicated this nation to "welcom[e] homeless refugees to our shore." Senate Report to the Refugee Act, at 1. The clear probability standard urged by the Government for asylum determinations will deny asylum to deserving applicants and will condemn to persecution innocent people who are bona fide refugees under our law. It is, in sum, a position inconsistent with our international obligations and unworthy of our Government.

For the reasons stated above, the



decision of the Court of Appeals should  
be affirmed.

Respectfully submitted,

---

Carol Leslie Wolchok

The Political Asylum  
Project of the American  
Civil Liberties Union  
Fund of the National  
Capital Area  
122 Maryland Avenue, N.E.  
Washington, D.C. 20002  
(202) 543-4651

Burt Neuborne  
Lucas Guttentag  
Jack Novik

The American Civil  
Liberties Union  
132 West 43rd Street  
New York, N.Y. 10036  
(212) 944-9800

Robert N. Weiner  
Shelley R. Slade  
Eric R. Biel

Arnold & Porter  
1200 New Hampshire  
Avenue, N.W.  
Washington, D.C. 20036  
(202) 872-6700

Attorneys for Amici Curiae

Dated: July 14, 1986

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UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
Phoenix, Arizona

File: A 26 306 224

December 17, 1985

In the Matter of:

G.

Respondent

)  
)  
)  
)  
)  
)  
)

IN DEPORTATION  
PROCEEDINGS

CHARGE: SECTION 241(a)(2), Immigration  
and Nationality Act - Entered without  
inspection.

APPLICATIONS: Political asylum,  
withholding of deportation, in the  
alternative voluntary departure.

ON BEHALF OF  
RESPONDENT:

ON BEHALF OF  
SERVICE:

Susan R.  
Giersbach, Esquire

Joseph Ragusa,  
Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

This is a deportation proceeding  
instituted by the Immigration and  
Naturalization Service against the above-  
named respondent pursuant to the

authority contained in Section 242 of the Immigration and Nationality Act. The respondent is a married male alien, a citizen and native of El Salvador, who entered the United States near Lukeville, Arizona on or about April 18, 1985.

On or about April 19, 1985 he was served with an Order to Show Cause charging that he was subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act in that he entered the United States without being inspected.

On or about July 22, 1985 respondent admitted the truth of the factual allegations contained in the Order to Show Cause, conceded deportability on the charge set forth and declined to designate a country of deportation and consequently El Salvador was directed.

Based upon the respondent's admissions, I conclude that he is deportable as charged in the Order to Show Cause.

Respondent has applied for relief from deportation in the form of political asylum, withholding of deportation and, in the alternative, voluntary departure.

In order to qualify for political asylum, there must be a showing that the respondent meets the statutory definition of refugee in Section 101(a)(42)(A) of the Act, that is, a person who is unable to unwilling to return to and is unable or unwilling to avail him or herself of protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.



The burden is upon the respondent to show that he will be persecuted or to show a well-founded fear of persecution in El Salvador on account of the above-mentioned factors.

Respondent must demonstrate his well-founded fear of persecution is more than conclusionary statements.

Respondent submitted his asylum application on Form I-589. This application was referred to the Department of State for an advisory opinion. The Department advised that the respondent had not established a well-founded fear of persecution in El Salvador.

Respondent's asylum application must be considered simultaneously as an application for withholding of deportation to El Salvador. Section 243(h) of the Act provides that

an alien cannot be deported to a country if such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion. To qualify for withholding a respondent must prove a clear probability that his life or freedom would be threatened in El Salvador on account of the above-mentioned factors.

The Ninth Circuit Court of Appeals law is binding upon this Court in this particular jurisdiction and some of the cases that have been instructive on the burden in establishing a well-founded fear of persecution include Bolanos-Hernandez v. INS, 749 F.2d 1316. The 9th Circuit held that the well-founded fear test is a more liberal test than the clear probability test under Section 243(h) of the Act. However, the

Court indicated that mere assertions of fears and generalized conditions are insufficient to establish the well-founded fear of persecution. However, an evaluation of whether an alien has a well-founded fear includes consideration of the alien's state of mind as well as general conditions in the country and the experience of others. The Court has held that there is no requirement to corroborate specific threats of persecution. The Court noted in this regard that it is difficult for aliens fleeing from persecution to corroborate testimony through documents and witnesses. Respondent must establish more than threats to establish a well-founded fear of persecution. Respondent must be able to establish that there is reason to take the threats seriously and that those making the threats have the

ability and will to carry out those threats. See also Arqueta v. INS, 759 F.2d 1396 and Cardoza-Fonseca v. INS.

The facts in this case reflect the following: Respondent is a 28 year old married male alien, citizen and native of El Salvador. His wife preceded him in entering the United States in January of 1985. He has three children who are currently residing in his hometown in El Salvador with his mother-in-law. Respondent was employed for approximately four years prior to his arrival in the United States as a traveling shoe salesman. He bought and resold shoes and worked the towns surrounding his hometown of Sensuntepeque.

Initially, it is appropriate to comment on respondent's credibility in this case since, with respect to specific factors, his is the only testimony

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concerning his claims for asylum and withholding. It is my observation that respondent testified in a straightforward and honest manner, his demeanor demonstrated to me that he was telling the truth. In my view his testimony is internally consistent. He answered with great specificity concerning the events surrounding his detention, beatings and interrogation. Upon being questions on cross-examination he answered in a quick and honest manner, admitting some things that may have been to his detriment without hesitation. And while there appears to be minor inconsistencies between respondent's application for political asylum and his testimony, I credit his oral testimony particularly with respect to item number 29 in the application for asylum which indicates

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that he had permission to leave the country.

Respondent testified that in December of 1984, the date he does not recall specifically, but it was a Saturday, two detectives came to his house at approximately 6:30 p.m. They asked for his name and showed him an identification card which had some initials on it and had the photograph of the detective on it. The detectives directed respondent to accompany him. They were dressed as civilians but respondent testified that they were armed. Respondent indicated he was taken to a car which he identified as a police car. He identified it as a police car from having observed it on prior occasions at the police station. Two additional men were waiting for respondent in the automobile. They



directed him to get into the car and the three sat with him. Two blocks down the street from his house the detectives directed respondent to lay on the floor. Respondent objected and as a result he was pushed onto the floor. The detectives handcuffed him with his hands behind him and as they got near the station put a blindfold on respondent. Respondent specifically testified that it was a green handkerchief. Respondent was taken to a small room at police headquarters where he was placed on a chair. Respondent described the room in some detail on cross-examination. He described the room has have linoleum tile floors, no windows, and a bare lightbulb in the ceiling. The detectives next took respondent's billfold from his pocket, lifted his blindfold somewhat and indicated he had quite a bit of money.

They began to question respondent. They asked who his guerrilla leader was, what his guerrilla nickname was, and how many confrontations he had been at. Respondent testified that he was mistreated while undergoing interrogation. This mistreatment took the form of being hit with closed fists in both the stomach and head and being required to do deep knee bends while blindfolded and handcuffed, virtually continuously from the time he was brought into the police station on Saturday evening until eleven P.M. on Monday evening. While doing deep knee bends the respondent was hit repeatedly and asked the questions alluded to above. He was told to do the deep knee bends until he told the truth. He indicated that from exhaustion he fell on the floor but was picked up by the hair or kicked by the

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police in order to continue doing the deep knee bends. Respondent testified that he denied knowing anything concerning what the police were asking him. During the detention until eleven P.M. respondent was not permitted to sleep, eat or use the bathroom. At eleven P.M. on Monday night, respondent was taken from the detention location where he was interrogated and beaten to a nearby police station. Respondent testified he had no idea he was going to the police station, but rather, his interrogators threatened to kill him. In this regard, a pistol was placed on his neck, he was picked up by the arms, and taken to a car. Respondent testified he was picked up in this manner because he could no longer stand. Upon being transferred to the automobile, respondent testified that he tried to get away. He

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said one of the detectives threw him into the car and at this point he hit his head. Upon arriving at the police station, respondent was asked if he wanted to go to the bathroom by a policeman. This policeman was not one of the four individuals who had originally picked the respondent up and interrogated him. At this point, respondent was taken to the bathroom and was told to take his blindfold off. Respondent spent from approximately eleven P.M. on Monday night until the next Saturday in custody at the police station. He testified he was still handcuffed and blindfolded but at this point his hands were handcuffed in front of him rather than behind him. Respondent testified that the detectives who had originally arrested him came to the police station and continued to ask him the same questions he had been asked

earlier concerning guerrilla activities. He was repeatedly asked to sign papers. Respondent testified he does not know what those papers said nor did he ask what they said. He did not know what they said because they were covered by a sheet of white paper. Respondent testified he signed approximately five papers and each time he signed something the interrogators laughed. Respondent testified that it was not until Tuesday afternoon that he was able to walk holding on to things because of the treatment he had received earlier. His blindfold was taken off for the first time on Wednesday night. Respondent testified that it was taken off in the evening because of the police concern that his eyes might be damaged if the blindfold was taken off during the day. Respondent testified he was released at

approximately four P.M. the following Saturday. He testified that a lieutenant told him that he should not get involved in those things because it was dangerous. Respondent testified that he believed he was told this because the police were suspicious that he was involved in guerrilla activities. At no time was respondent either told why he was arrested nor why he was released. While in the police station, the respondent was fed. He slept in a hallway with a police guard on a cement floor. Upon respondent's release his wrists were raw from the handcuffs.

Upon respondent's release he went to his house where his wife indicated that his family had done everything possible to get him released by the police and authorities said that they had no knowledge of where respondent was



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located. Approximately 15 days after he was released respondent testified he began to observe a policeman in plain clothes watching the respondent. Respondent testified he knew this policeman's face and had been told by his brother that this individual was a plainclothes policeman. Respondent testified that he saw this individual approximately three times per week watching him at the private house where only his family bought water and at a bus stop. Respondent testified he rarely saw this individual prior to his arrest in December of 1984.

Respondent testified further that after his arrest he began to alter his behavior. In this regard he testified that he began sleeping in different places. These places included his

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mother's house, his sister's house, and his mother-in-law's house.

In early January, 1985 while on a selling expedition in San Luis Potosi, approximately 70 kilometers from his home, respondent was stopped by guerrillas along with other individuals at a roadblock. Respondent testified that all of the goods belonging to the travelers were taken by the guerrillas. The guerrillas indicated that they had broadcast a warning on their clandestine radio station that there would be a stoppage of all transportation on that particular day. Respondent testified that he was not threatened in any manner by the guerrillas.

Respondent departed from El Salvador on April 8, 1985. He testified that he did not obtain a passport to leave the country. Concerning permission

to exit the country, respondent testified that the bus driver of the bus he was traveling in would take a list of the passengers to the authorities and then the bus would be permitted to travel from El Salvador into Guatemala. Respondent testified that he crossed a river to go from Guatemala to Mexico. Respondent testified that he did not ask for political asylum in either Guatemala or Mexico nor did he request political asylum from the American Consulate. Respondent testified he did not learn of political asylum until his first hearing before Immigration Judge Nail on July 16, 1985.

One of the crucial issues in my view in this case concerns the amount of time between respondent's initial arrest in December of 1984 and the period of time until his departure on April 8 of

1985. The Government would argue that respondent's delay in departing should lead to an inference that respondent did not fear persecution. The Government would further contend that respondent's motivation in leaving El Salvador was primarily economic rather than fear of political persecution. Respondent's wife had already traveled to the United States primarily for economic reasons after respondent's shoe business, which respondent's wife worked, failed as a result of the guerrilla seizure of his goods.

While economics may indeed have been a factor in respondent's decision to leave El Salvador and come to the United States, in my view the evidence does not mandate a finding that that was the only or primary reason for respondent's departure. As I have noted before, I

credit respondent's testimony in this case. In December of 1984 he was arrested, accused of guerrilla activities and severely mistreated in order to get him to confess to engaging in guerrilla activities. While respondent's mistreatment in a severe manner ceased after he was remanded to the custody of the police, respondent was further interrogated concerning guerrilla activity, was maintained in police custody and handcuffs and was directed to sign papers. Now we have no idea what those papers were. Respondent has testified that he could not see what was written on those papers. However, I think a reasonable inference can be drawn that whatever was on those papers was not something that was of benefit to respondent.

Had the matter ended at this point, particularly in view of no further interrogations or arrests by respondent, I think a good argument could be made that there was no reason to fear anything further on the part of the police. However, the matter did not end at this point. In this regard, respondent has credibly testified that he was being observed by a policeman approximately three times per week in various places. Respondent testified that prior to his arrest that he had not observed this individual but on rare occasion. In view of respondent's arrest, interrogation and beatings, I think a reasonable inference can be drawn that he was continually observed by the police who initially arrested him.

Based upon the above, I conclude that respondent has established a well-



founded fear of persecution based upon what the government perceived to be his activities on behalf of the guerrillas. Whether respondent in fact engaged in guerrilla activities or not is immaterial. It appears that the government believed he was so engaged.

With respect to respondent's application for withholding of deportation, the burden there is much greater. Both the 9th Circuit and the Board of Immigration Appeals require that fear of persecution be established by a clear probability, that is, that it be more likely than not that one be persecuted upon their return to El Salvador as a result of race, religion, nationality, membership in a particular social group or political opinion. I cannot say that respondent has satisfied that particular burden. I believe that

that is a much higher standard of proof and I find, based upon the above factors, that respondent did not satisfy that burden of proof.

With respect to respondent's application for voluntary departure, should the Board of Immigration Appeals reverse my decision on the application for political asylum, I find that respondent is eligible for voluntary departure in that he established himself to be a person of good moral character and is willing to obey any orders of this Court and has sufficient funds with which to pay for his trip to El Salvador.

ORDER: IT IS ORDERED that respondent's application for political asylum be granted and that his application for withholding of deportation be denied, and that his application for voluntary departure

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should be granted in whatever amount of time the Board of Immigration Appeals should direct.

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s/JOHN J. McCARRICK  
Immigration Judge

(10)  
No. 85-782

Supreme Court, U.S.  
FILED

JUL 4 1985

JOSEPH E. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1985

— 0 —  
IMMIGRATION AND NATURALIZATION SERVICE,

*Petitioner,*

v.

LUZ MARINA CARDOZA-FONSECA,

*Respondent.*

— 0 —  
**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

— 0 —  
**BRIEF OF AMICUS CURIAE  
THE AMERICAN IMMIGRATION  
LAWYERS ASSOCIATION**

— 0 —  
DEBORAH ANKER, Esq.  
1545 Massachusetts Ave.,  
L-160  
Cambridge, MA 02138

CHERYL LITTLE  
NIELS FRENZEN, Esq.  
Haitian Refugee Center,  
Inc.  
32 N.E. 54th Street  
Miami, FL 33137

Counsel of Record

IRA J. KURZBAN, Esq.  
KURZBAN, KURZBAN,  
WELINGER AND HOLTSBERG  
Plaza 2650, Second Floor  
2650 S.W. 27th Avenue  
Miami, FL 33133  
(305) 444-0060



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## STATEMENT OF INTEREST

The American Immigration Lawyers Association is a national organization of practicing lawyers and law school professors who practice and teach in the fields of Immigration and Nationality law. The Association has a direct and serious interest in the development of Immigration and Nationality law and in the case presently before the Court. The standard of proof to be applied in immigration hearings concerning asylum under § 208 of the Immigration and Nationality Act directly affects many of the Association's members and clients. The Association is submitting its brief in support of the respondent's position. All parties have consented to the filing of the brief.

— o —

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976) should be applied to establish the appropriate standard of proof for asylum claims under § 208 of the Immigration and Nationality Act. In *Mathews*, this Court recognized that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) . . . . 'Due process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)." *Mathews*, 424 U.S. at 334.

This Court's sensitivity to these concerns has resulted in an analysis that recognizes the importance of minimiz-

ing the risk of erroneous decisions in cases with drastic consequences. *Addington v. Texas*, 441 U.S. 418 (1979); *In Re: Winship*, 397 U.S. 358 (1970); and *Speiser v. Randall*, 357 U.S. 513 (1958). Although immigration cases have been characterized as civil proceedings, *I.N.S. v. Lopez-Mendoza*, 104 S.Ct. 3479, 3484 (1984), this Court has recognized that fundamental liberty interests may be implicated because deportation may lead to "persecution or even death." *Bridges v. Wixon*, 326 U.S. 135, 164 (1945). Asylum determinations pose drastic consequences for an applicant if the decisionmaker errs. Indeed, asylum proceedings are more akin to death penalty cases in their consequences for erroneous decisionmaking than they are to routine immigration proceedings.

The consequence of an erroneous decision in asylum must be considered in the context of the likelihood that such error would be committed. Both institutional and cultural factors in the asylum process substantially increase the likelihood of an erroneous decision. Among the institutional factors which increase the likelihood of an erroneous decision in asylum proceedings are the methods for decisionmaking used by the immigration judges and the State Department, the applicant's difficulty in establishing his claim, and the politicization of the asylum process. Cultural and linguistic factors also enhance the potential for erroneous decisions. Perhaps more than any other legal proceeding, the asylum decision critically rests on an evaluation of the applicant's credibility. *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1336-37 (9th Cir. 1986). Yet cultural differences so central to that credibility assessment could not be greater than those between an immigration judge and a recently arrived applicant. The inter-

play between the asylum applicant's culture and the court's perception of credibility, in both verbal and nonverbal communication and conceptualization, increases the risk of erroneous decisions.

In reaching its decision, the Court below recognized that the burden of proof continues to remain with the applicant. The potentially drastic effects of an erroneous decision in asylum are mitigated, however, if this Court provides a less onerous standard of proof which can compensate for the institutional and cultural problems inherent in the asylum process. The more generous standard advanced by the court below is consistent with this Court's analysis in *Mathews* and its concern for minimizing the risk of erroneous decisionmaking. The three pronged *Mathews* test supports a more generous standard in the asylum context. The asylum applicant's interest is of the highest order and may involve life itself. The risk of an erroneous deprivation, by virtue of a higher standard of proof, is considerable given the institutional and cultural problems inherent in the asylum process. The government will suffer no greater fiscal or administrative burden by the use of a burden more sensitive to the special evidentiary and cultural problems of proof faced by the asylum applicant. The decision of the lower court, therefore, is supported by this Court's determination in *Mathews* and its continuing concern for the suppression of error in the administrative process, particularly when the consequences of an erroneous decision are so substantial.

## ARGUMENT

This Court has repeatedly expressed its concern that the standard, as well as, the burden of proof should be allocated in a manner consistent with the risk and consequence of error in the decisionmaking process. *Addington v. Texas*, 441 U.S. 418 (1979); *In Re: Winship*, 397 U.S. 358 (1970); *Speiser v. Randall*, 357 U.S. 513 (1958). In *Addington*, this Court recognized that:

The function of a standard of proof . . . is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In Re: Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

*Addington*, 441 U.S. at 423.

The Court further observed that "[i]n considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest . . . and the state's interest . . . . Moreover, we must be mindful that the function of the legal process is to minimize the risk of erroneous decisions." *Id.* at 425.

The Court's consideration of the questions of risk and consequence of error is consistent with the long-standing view that "[d]ue process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. at 895, and that due process "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. at 481. This view of due pro-

cess and the concern that the standard of and procedures for review consider the possibilities of erroneous deprivations have been crystalized in *Mathews v. Eldridge*, 424 U.S. 319 (1976). To determine the content of due process, including the appropriate standard of proof in the administrative context, the Court must consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. at 335.

### A. The Private Interest Affected.

The private interest at stake is paramount. Other than capital cases where the death penalty is a potential outcome, no other litigation, except asylum, subjects an individual to such drastic consequences if an erroneous decision is made. In asylum adjudication, the private interest factor implicates life or death stakes that are the highest possible.<sup>1</sup> No other "civil" litigation potentially

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<sup>1</sup>*H.R.C. v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd* as modified *sub nom* *H.R.C. v. Smith*, 676 F.2d 1023 (5th Cir. 1982); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 377 (C.D. Cal. 1982); *Nunez v. Bolden*, 537 F.Supp. 578, 586 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982); See also, *Coriolan v. I.N.S.*, 559 F.2d 993 (5th Cir. 1977); ABA Section of Individual Rights and Responsibilities, Report to the House of Delegates, 3-13 (Mimeo Aug. 1982). (Seeking ABA efforts to assure that immigration reform legislation would provide extensive procedural protection for asylum applicants based on observation that asylum may be a "life or death" matter).



subjects an individual to torture or summary execution if a case is wrongfully denied. The courts have repeatedly recognized the drastic consequences of an erroneous decision. *H.R.C. v. Civiletti*, 503 F.Supp. 442, 454-455 (S.D. Fla. 1980), *aff'd as modified sub nom. H.R.C. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

In the immigration context, this Court has not hesitated to adjust the standard of proof to the potential drastic consequences of an erroneous decision. Although deportation proceedings are generally civil in nature, *I.N.S. v. Lopez-Mendoza*, 104 S.Ct. 3479, 3484 (1981), this Court has required the government to meet a higher standard of proof even in deportation proceedings, recognizing the serious implications of deportation. In *Woodby v. I.N.S.*, 385 U.S. 276 (1966), the Court established the requirement that the INS must prove deportability by "clear, unequivocal and convincing evidence." This Court reasoned that while a deportation proceeding is not a criminal prosecution:

[I]t does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.

*Woodby*, 385 U.S. at 285.

Moreover, this Court has recognized that special due process interests are at stake in deportation cases where "[r]eturn to [one's] native land may result in . . . persecution and even death." *Bridges v. Wixon*, 326 U.S. 135,

164 (1945). See also, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950); *H.R.C. v. Civiletti*, 503 F.Supp. 442, 455 (S.D. Fla. 1980) ("In a very graphic sense the political asylum applicant who fears to return to his homeland because of persecution has raised the spectre of truly severe deprivation of life, liberty and property; in this case harassment, imprisonment, beating, torture and death.")

Because the private interest that will be affected by an erroneous decision is so substantial, the first prong of the *Mathews* test supports a more generous standard than that of "clear probability."<sup>2</sup>

#### **B. The Risk Of An Erroneous Deprivation Of Such Interests Through The Procedures Used.**

The procedures employed in the adjudication of asylum claims have notable institutional and cultural problems.<sup>3</sup> The deficiencies in the asylum process attributable to institutional and cultural factors enhance the likelihood of error in the asylum process.

Immigration hearings on asylum claims are fraught with procedural difficulties. There are few operative evidentiary rules governing immigration proceedings and, at present, there are no rules of court. Immigration judges have "broad authority for an active or inquisitorial role . . . . The statute expressly authorizes them to present or

<sup>2</sup>Unlike the finding of deportability itself, the burden to prove asylum, even with the more generous standard argued for here, will remain with the applicant. 8 C.F.R. § 208.5 (1986).

<sup>3</sup>Kurzban, *Restructuring the Asylum Process*, 19 San Diego L. Rev., 91, 98-110 (1981).

receive evidence, and also to interrogate, examine and cross-examine witnesses, including the alien respondent." Aleinikoff and Martin, *Immigration Process and Policy* 88 (1985). This non-adversarial model has been criticized particularly because it takes place in a setting where the decisionmaker "by training and background may be biased toward enforcement and skeptical of the alien's claim." *Id.*; See, *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1363-66 (1983); M. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 San Diego L. Rev. 144, 147-48 (1975). Furthermore, this adjudicatory process has been governed by a system of "secret law"<sup>4</sup> and "negative jurisprudence"<sup>5</sup> where no decisions of the immigration judges are officially published and the vast majority of the Board of Immigration Appeals decisions are unpublished. All these decisions, therefore, are non-precedential.

The task of adjudicating an asylum claim is further complicated for immigration judges because it requires them to evaluate the political and economic conditions that the applicant has fled. An inquiry of this sort obviously calls for a type of judgment that exceeds the typical judicial function; it requires the making of moral and political judgments for which there are no manageable

<sup>4</sup>Davis, *Administrative Law: Cases-Text-Problems* 86 (1965).

<sup>5</sup>Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 Colum. L. Rev. 1293, 1341 (1972).

standards.<sup>6</sup> This problem is exacerbated by the lack of training or the development of expertise by the adjudicators on the political and social conditions in countries or issues concerning international law and foreign affairs.<sup>7</sup>

The procedural and institutional problems associated with asylum adjudications are further complicated by reliance upon State Department recommendations concerning political asylum. 8 C.F.R. § 208.10(b) (1985) (BHRHA opinion, unless classified . . . will be made part of the record . . .). Congress has recognized, however, the longstanding inability of the State Department, even with very limited numbers of applications, to make a meaningful inquiry into an asylum claim.<sup>8</sup> The present system theoretically relies upon American embassies throughout the world to verify facts alleged by individual asylum

<sup>6</sup>In recognition of this problem, the Select Commission on Immigration and Refugee Policy recommended that area experts be appointed to provide information on conditions in the source country and that carefully drawn profiles be used in order to promote uniformity and equity of initial decisions. Select Committee on Immigration and Refugee Policy, 96th Cong., 2d Sess., Semiannual Report to Congress 202 (Comm. Print 1980) (hereinafter referred to as "Select Commission Report") at 43.

<sup>7</sup>Both the Senate and House in previous versions of the current immigration reform legislation sought to alleviate this problem by requiring special training for immigration judges. See Immigration Reform and Control Act of 1983, H.R. 1510, 98th Cong., 1st Sess., 129 Cong. Rec. 346-86 (1983). Current proposed legislation, however, does not contain any provisions concerning this issue; nor does it address any issues concerning political asylum.

<sup>8</sup>Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary. Report on Haitian Emigration, 94th Cong., 2d Sess. 8-9 (Comm. Print 1976).

applicants. Due to limited resources, however, the determinations are often left to the desk officer at the State Department or the Bureau of Human Rights and Humanitarian Affairs, or turn on the vicissitudes of the State Department's general policy toward a particular country. In short, the State Department's recommendation often reflects a political judgment, contrary to Congress' intent,<sup>9</sup> rather than an investigation of individual facts. *Zamora v. I.N.S.*, 534 F.2d 1055, 1059 (2d Cir. 1976); Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. Mich. J.L. Ref. 183, 236 (1984).

As a result, the courts have routinely questioned and criticized the impartiality and utility of State Department reports in the asylum process.<sup>10</sup> In *Kasravi v. I.N.S.*, 400 F.2d 675, 677 n. 1 (9th Cir. 1968), the Circuit Court found the competency of the State Department reports highly questionable in light of the politicization of the process:

Such letters from the State Department do not carry the guaranties of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world . . . . No hearing officer or court has the means to know the diplomatic necessities

<sup>9</sup>Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981); Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243 (1984).

<sup>10</sup>*Zamora v. I.N.S.*, 534 F.2d 1055, 1059 (2d Cir. 1976); *Hossein Mardi v. I.N.S.*, 405 F.2d 25, 27 (9th Cir. 1968); *Kasravi v. I.N.S.*, 400 F.2d 673, 677 n. 1 (9th Cir. 1968).

of the moment, in the light of which the statements must be weighed.

These institutional and procedural defects are particularly problematic because an asylum applicant suffers under special disabilities that make it extremely difficult to present effectively his claim. Both the United Nations High Commissioner for Refugees (UNHCR)<sup>11</sup> and our own federal courts<sup>12</sup> have recognized the extreme problems involved in establishing an asylum claim for an applicant who finds himself "in an alien environment and may experience serious difficulties, technical and psychological in submitting his case to the authorities . . . often in a language not his own."<sup>13</sup>

In addition to the institutional impediments to the establishment of procedures which diminish the risk of error in the immigration court system, the fact-finder is faced with serious cross-cultural obstacles in determining asylum claims and, particularly, in assessing an applicant's credibility. Because of the inquisitorial nature of the asylum process as well as the broad unguided discretion of the immigration judge, an asylum claim critically turns on the judge's perception of the applicant's credibility.<sup>14</sup>

<sup>11</sup>United Nations High Commissioner for Refugees, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 189-194 (hereinafter cited as "Handbook").

<sup>12</sup>*Coriolan v. I.N.S.*, 559 F.2d 993, 1004 (5th Cir. 1977); *Zamora v. I.N.S.*, 534 F.2d at 1062; See, also, *Matter of Martinez-Romero*, 18 I&N Dec. 75, 78 (BIA 1981).

<sup>13</sup>*Handbook* at ¶190.

<sup>14</sup>Martin, *Refugee Act of 1980, Its Past & Future*, 1982 Mich. Y.B. Int'l Legal Stud., 115 (1982) ("Bonafide applicants are unlikely

(Continued on following page)



An immigration judge's comprehension of an applicant's testimony, however, is regularly hindered, and even distorted, by cross-cultural differences that often work to the asylum seeker's disadvantage. Even under the best circumstances, these problems can hinder the fact finding process.<sup>15</sup> There are a number of obstacles to undistorted interaction in the asylum adjudication process resulting from cross-cultural misunderstandings, including "powerless speech," the interpreter, different perceptions of time, and the cultural relativity of concepts of truth and falsehood.<sup>16</sup> A finding of lack of credibility can result from, for example, the applicant's hesitation in speech. "Powerless speech" often occurs among "former members of political parties and groups which [were] illegal in their home countries and where activities were largely covert."<sup>17</sup> Eye contact, demeanor, tone of voice, assertiveness, direct

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(Continued from previous page)

to have left their homelands with corroborating documentation in hand or with supporting witnesses. Asylum determinations, therefore, revolve critically around a determination of the applicant's credibility.) Comment, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 Harv. C.R.-C.L.L. Rev. 493, 532-535 (1986) (citing the credibility-based and fact-dependent nature of asylum cases); *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1336-37 (9th Cir. 1986); *Arguetta v. I.N.S.*, 759 F.2d 1395 (9th Cir. 1985). See also, *Coriolan v. I.N.S.*, 559 F.2d 993, 999 (5th Cir. 1977).

<sup>15</sup>Kaelin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, No. 2, 20 Int'l Migration Rev. 230 (1986).

<sup>16</sup>*Id.* at 231. See also, Comment, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 Harv. C.R.-C.L.L. Rev. 493, 528-29 (1986).

<sup>17</sup>*Id.* See generally Latin-American Bureau, *Haiti: Family Business* (1985) (Danger of direct and open speech with governmental authorities in dictatorial societies).

and unceremonious style of speech are all traits which help establish credibility. All of these traits, however, are culturally relative. E. Lind and W. O'Barr, *The Social Significance of Speech In the Courtroom*, Language and Social Psychology (H. Giles and R. St. Clair eds., 1979). These factors have been identified by anthropologists and sociologists as generally characteristic of aliens and profoundly affecting the outcome of either legal proceedings or of cross-cultural communications.<sup>18</sup> An asylum applicant is at a distinct disadvantage when he is being judged for credibility if he is unaware of the social customs of his host society. Such an individual unwittingly communicates a non-credible image solely because of his nonverbal actions:

People who are new to a culture, or subculture—foreign students, tourists, immigrants, refugees, researchers—are at least for a period in the position of being unskilled in their new environment. Though usually socially skilled in their own culture, they are now forced into the frustrating and embarrassing role of being socially unskilled and inadequate in the new culture. They often do not know the language, they are bewildered by the different social routines . . . . They are unaware of the implicit messages they give or receive by their own or others' nonverbal communication; they are astounded by different conventions of self-preservation, self-disclosure, assertive-

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<sup>18</sup>*Id.* Danet, *Language in the Courtroom*, Language, Social and Psychological Perspectives 367-376 (Giles ed. 1980); Danet, *Language and the Legal Process*, 14 Law & Soc'y Rev., 447 (1979); Mir-Djalali, *The Failure of Language to Communicate: A U.S.-Iranian Comparative Study*, 4 Int'l J. of Intercultural Relations 307 (1980); Furnham & Bochner, *Social Difficulty in a Foreign Culture: An Empirical Analysis of Culture Shock*, Cultures in Contact 190 (Bochner ed. 1982); Gumperz, *Discourse Strategies* (1982).

ness, and friendship formation. In other words they suffer from what Oberg (1960) called 'culture shock.'

M. Argyle, A. Furnham and J. Graham, *Social Situations*, 344 (1981).<sup>19</sup> Culture shock operates most potently "[t]he greater the disparity between the host society and the sojourners culture . . ." A. Furnham and S. Bochner, *supra* at 190. Such is the condition for the vast majority of asylum applicants who come from the developing nations and are applying for asylum in the West. Kaelin, note 15 at 232.

Linguistic and translation problems also enhance the risk of an erroneous decision in the asylum context. Because of significant linguistic misunderstanding, officials frequently decide an applicant is lying, covering up, or exaggerating, although the applicant is doing his best to honestly provide all the information which he thinks is requested. A. Pousada, *Interpreting For Language Minor-*

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<sup>19</sup>Asylee exodus alone is a traumatic experience. It often occurs under complete panic conditions. Even when long-range planning occurs, exodus is still usually clandestine, dangerous, and with family members left behind or lost en route. The result: asylees are left "midway to nowhere." Kunz, E.F., *The Refugee in Flight: Kinetic Models and Forms of Displacement*, 7 Int'l Migration Rev. 125-146 (1973). The emotional burdens carried by the asylees are often reflected not only in a general sense of malaise, fatigue and psychosomatic complaints, but as evidences of lethargy, withdrawal and seclusion, huddling, expressions of melancholy, and crying in private. Segal, Julius and Norman Lourie, *The Mental Health of the Vietnam Refugees: Memorandum to Rear Admiral S.G. Morrison*, Washington, D.C.: U.S. Department of Health, Education and Welfare, National Institute of Mental Health (1975). Such orientation problems can have strong adverse consequences on the manner in which the applicant's claim is perceived by the judge. See Austerlitz, *The Use of Psychological Evaluations in Political Asylum Hearings*, 15 Immigration Newsletter, No. 3 (1986). (Effects on asylees' post-traumatic shock syndrome on claims for asylum.) See also D. Haines, *Refugees in the United States* (1985).

*ities in the Court*, Language in Public Life 186 (Alatis and Tucker eds. 1979). Additional confusion results from misinterpretation of concepts such as self<sup>20</sup> and family,<sup>21</sup> and the filtering of these concepts through different cultural value systems.<sup>22</sup>

These linguistic problems are magnified by problems of translation. One of the greatest misconceptions in the field of linguistic translation is that if a person is bilingual that person is able to interpret. *Seltzer v. Foley*, 502 F. Supp. 600, 607 (S.D.N.Y. 1980). Interpreting in the courts requires close attention to the specific forms of the words as well as their meanings. Technical and legal terms for which there may be no exact linguistic equivalents in the other language have to be dealt with. Consistency of interpretation of key words is vital to the understanding of legal arguments. In addition, there are questions of language and dialect variation. The interpreter must be able to understand and communicate the subtlety of phonological, lexical, and syntactic variation. Pousada, *supra*, at 199.

In recognition of the important role of translators in the courtroom, Congress adopted the Court Interpreters

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<sup>20</sup>To westerners, the self is a dynamic center of motivation, judgment and action. Conversely, many asylum applicants come from group-oriented societies where the center of social life is the family or community. C. Geertz, *The Interpretation of Cultures*, 59 (1973).

<sup>21</sup>C. Charles, *A Panorama of Haitian Culture* Paper presented to Bilingual Program Dade County, Florida Public Schools (June 1986).

<sup>22</sup>See, e.g., C. Huntington, "Language of Jurisprudence," *Language: Its Meaning and Function* (R. Ashen ed. 1971); W. Goodenough, *Culture, Language and Society* 63 (1981).



Act in 1978. 28 U.S.C. § 1827 et seq.<sup>23</sup> This Act took away the trial judges' "wide discretionary powers" in determining when and whom to appoint as an interpreter.<sup>24</sup> The determination of language proficiency is a complex matter. On motion of counsel, a judge must appoint a certified interpreter whose qualifications have been determined by objective standards. The Act, however, is directed solely to proceedings in federal courts and does not include immigration proceedings and asylum hearings, although experts have acknowledged that competent interpretation is most needed in civil and administrative proceedings. Pousada, *supra* at 121. In immigration proceedings there are no regulations governing selection of translators. The result has been non-simultaneous,<sup>25</sup> flawed translations<sup>26</sup> in asylum proceedings.

<sup>23</sup>Under Section 1827(b) of P.L. 95-539 (Oct. 28, 1978), the Director of Administrative Office of the United States Courts is mandated to "prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in courts of the United States in bilingual proceedings . . ." The Act provides that the presiding judicial officer shall use the services of a certified interpreter in all criminal and civil actions initiated by the United States in a United States district court.

<sup>24</sup>Congressional Record-House: October, 1978, Pg. 34880. Congressman Fred Richmond, author and sponsor of the bill, concluded that it is not an unreasonable thing to guarantee a person at trial the right to understand all the proceedings, adding that "In this great country of ours, the fact that they must even make this request is a disgrace." See generally, Annot., *Right of Accused to Have Evidence or Court Proceedings Interpreted*, 36 ALR 3d 276 (1971).

<sup>25</sup>*Matter of Exilus*. 18 I&N Dec. 276 (BIA 1982) (Simultaneous translations not required in asylum hearings).

<sup>26</sup>*Augustin v. Sava*, 735 F.2d 32, 35-37 (2d Cir. 1984).

The structural problems inherent in the current asylum adjudication process, the cultural and linguistic difficulties, the applicant's own difficulty and frequent inability to obtain information to support his claim for asylum, all enhance the risk of an erroneous decision in the asylum proceeding. The establishment of a more generous standard in asylum will serve to allocate the risk of error in a more balanced manner to compensate for the numerous deficiencies in the present asylum process.

### C. The Government's Interest.

The utilization in an asylum proceeding of a less onerous standard than that employed in other immigration proceedings does no harm to any governmental interest. Immigration judges already utilize different standards in different types of hearings.<sup>27</sup> Indeed, immigration judges are familiar with the subtleties of shifting burdens of proof.<sup>28</sup> The use of one standard for political asylum and another for withholding of deportation under § 243(h) of the Immigration and Nationality Act would not, therefore, pose any additional administrative burdens on the agency. Financially, no additional costs would be imposed by utilization of a more generous standard for asylum. Moreover, the utilization of a less onerous standard in this context does not require the establishment of any new

<sup>27</sup>Compare, determination of deportability by the "clear, unequivocal and convincing" standard with the determination of excludability where the excludable alien has the burden of proving clearly and beyond a doubt that he is entitled to enter the United States. 8 U.S.C. § 1325(b).

<sup>28</sup>8 U.S.C. § 1361; *Matter of Benitez*, I.D. #2979 (BIA 1984).



procedures within the agency, the establishment of new organizations or even hiring of any new personnel. In short, it places no additional burdens on immigration judges adjudicating asylum claims.

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### CONCLUSION

This Court has repeatedly expressed its concern for minimizing the risk of error when the consequences of error are great. It is beyond cavil that an error in the asylum adjudications context may result in the most serious deprivation possible—life itself. The current procedures employed in the asylum process and the standard of proof urged by the government do not adequately safeguard against the potential risk of error. The utilization of a more generous standard in asylum will help to minimize the risk of error and will not result in any additional fiscal or administrative burdens. Under these circumstances, this Court's analysis in *Mathews* strongly supports the use of a more generous standard of proof in asylum urged by the lower court and advanced by the respondent here.

Respectfully submitted,

KURZBAN, KURZBAN, WEINGER AND  
HOLTSBERG  
Plaza 2650, Second Floor  
2650 S.W. 27th Avenue  
Miami, Florida 33133  
(305)/444-0060

By: IRA J. KURZBAN

DEBORAH ANKER, Esq.  
1545 Massachusetts Ave., L-160  
Cambridge, Massachusetts 02138

CHERYL LITTLE  
NIELS FRENZEN, Esq.  
Haitian Refugee Center, Inc.  
32 N.E. 54th Street  
Miami, Florida 33137

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No. 85-782

Supreme Court, U.S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

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IMMIGRATION AND NATURALIZATION SERVICE,  
PETITIONER

*v.*

LUZ MARINA CARDOZA-FONSECA

---

*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**MOTION FOR LEAVE TO FILE  
POST-ARGUMENT MEMORANDUM AND  
POST-ARGUMENT MEMORANDUM  
FOR THE PETITIONER**

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CHARLES FRIED  
*Solicitor General  
Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

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13892

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**MOTION FOR LEAVE TO FILE POST-ARGUMENT  
MEMORANDUM FOR THE PETITIONER**

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Pursuant to Rule 35~~4~~ of the Rules of this Court, the Solicitor General, on behalf of the petitioner, moves for leave to file the annexed post-argument memorandum.

This case was argued on October 7, 1986. Since that time, Congress has passed the Immigration Reform and Control Act of 1986 Pub. L. No. 99-603 (Nov. 6, 1986). That Act, among other things, provides an avenue for legalization of the status of certain aliens who have continuously resided unlawfully in the United States since January 1, 1982. Re-



spondent's unlawful residence in this country began on October 1, 1979, and she therefore may be eligible to pursue the procedures contemplated by the new legislation. Because the Court may be concerned about whether the new legislation renders this case moot, the annexed memorandum describes that legislation and discusses its effect on the justiciability of this case.

Respectfully submitted.

CHARLES FRIED  
Solicitor General

NOVEMBER 1986

⑤  
Case:

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## In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-782

IMMIGRATION AND NATURALIZATION SERVICE,  
PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUITPOST-ARGUMENT MEMORANDUM  
FOR THE PETITIONER

1. Respondent entered the United States on June 25, 1979, as a nonimmigrant visitor authorized to remain until September 30, 1979. She stayed in this country beyond that date without permission. In deportation proceedings, she requested asylum and withholding of deportation pursuant to Sections 208(a) and 243(h), respectively, of the Immigration and Nationality Act of 1952 (the Act), 8 U.S.C. 1158 (a), 1253(h). The immigration judge denied both forms of relief, holding that the eligibility standard,

for asylum and the "clear probability of persecution" required for withholding of deportation were equivalent to one another, and that respondent had not met that standard. The Board of Immigration Appeals dismissed an appeal, but the court of appeals reversed and remanded, holding that the showing necessary for eligibility for asylum was lower than that required for withholding of deportation. This Court granted our petition for a writ of certiorari to determine whether the two standards are equivalent.<sup>1</sup>

2. On November 6, 1986 (thirty days after the argument in this case), the President signed into law the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (*reprinted in* 132 Cong. Rec. H10068-H10091 (daily ed. Oct. 14, 1986)). The new statute does not amend the asylum and withholding-of-deportation provisions of the Act or otherwise bear on their interpretation. There is therefore nothing in the new legislation that bears substantively on the question presented in this case. The legislation does, however, make available to certain aliens in the United States a new means by which to legalize their status.

Section 201(a) of the recent statute adds a new Section 245A to the Act. Section 245A(a) requires the Attorney General to adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien (1) makes a timely application for adjustment of status, (2) entered the United

<sup>1</sup> There is a conflict in the circuits on the issue presented, as discussed in our petition and in the various briefs on the merits. Since the argument, another court of appeals has cited, and agreed with, the decision below in this case. See *Carcamo-Flores v. INS*, No. 86-4062 (2d Cir. Nov. 6, 1986), slip op. 8.

States before January 1, 1982, and has resided continuously in the United States in an unlawful status since that date, (3) has been continuously physically present in the United States since the date of enactment of Section 245A, and (4) meets (or the Attorney General waives) the conditions for admissibility described in Section 245A(a)(4) and elsewhere in the Act.<sup>2</sup> Section 245A(b), among other things, gen-

<sup>2</sup> For example, the alien must not have been convicted of a felony or of three or more misdemeanors committed in the United States (Section 245A(a)(4)(B)), must not have assisted in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion (Section 245A(a)(4)(C)), and must be registered or registering for the draft, if required to do so (Section 245A(a)(4)(D)).

The alien will not be admissible, and the Attorney General may not waive the ground of exclusion, if the alien has been convicted of a crime of moral turpitude or has been convicted of two or more nonpolitical offenses resulting in a sentence of five years or more (Section 245A(d)(2)(B)(ii)(I) and Section 212(a)(9) and (10), 8 U.S.C. 1182(a)(9) and (10)); if the alien is likely to become a public charge, is not eligible for certain Social Security benefits, and does not have a history of self-supporting employment in the United States (Section 245A(d)(2)(B)(ii)(II) and (iii) and Section 212(a)(15)); if the alien has certain drug-related convictions or is a known trafficker in illegal drugs (Section 245A(d)(2)(B)(ii)(III) and Section 212(a)(23)); if the alien meets certain statutory definitions relating to threats to national security and to membership in certain organizations (Section 245A(d)(2)(B)(ii)(IV) and Section 212(a)(27)-(29)); or if the alien assisted in the Nazi persecution (Section 245A(d)(2)(B)(ii)(V) and Section 212(a)(33)).

The alien will not be admissible, but the Attorney General may waive the ground of exclusion (Section 245A(a)(4)(A) and (d)(2)(B)(i)), if the alien falls within certain other categories, such as the mentally retarded (Section 212(a)(1)), the insane or similarly impaired (Section



erally requires the Attorney General, on application by the alien, to adjust the status, to that of a permanent resident (see Section 245 of the Act, 8 U.S.C. 1255), of an alien who has been granted lawful temporary resident status under Section 245A(a) and has been in that status at least 18 months but not more than 30 months at the time of application, provided that the alien meets certain conditions similar to the admissibility conditions described above and demonstrates specified basic citizenship skills. Once the alien has achieved permanent resident status, he or she may achieve citizenship on the same basis as any other permanent resident (see generally Section 316 of the Act, 8 U.S.C. 1427).

The legalization program embodied in Section 245A(a) and (b) is neither self-executing nor immediately effective. Section 245A(g)(1) generally empowers the Attorney General, after consultation with the Senate and House Committees on the Judiciary, to implement the Section by regulation, and Section 245A(a)(1)(A) specifically authorizes the Attorney General to designate a date, not later than 180 days after the date of enactment of Section 245A, on which the 12-month "application period" will begin. Until such a date is set (and arrives), no alien will be entitled to the benefits of Section 245(a) and (b). Before that date, however, an alien

212(a)(2)-(4)), drug addicts and alcoholics (Section 212(a)(5)), those afflicted with contagious disease (Section 212(a)(6)), professional beggars (Section 212(a)(8)), polygamists (Section 212(a)(11)), prostitutes (Section 212(a)(12)), stowaways (Section 212(a)(18)), those who have sought to enter the United States by fraud (Section 212(a)(19)), and those who have knowingly and for gain assisted any other alien to enter or try to enter the United States in violation of law (Section 212(a)(31)).

who has been apprehended and who can establish a prima facie case of eligibility for adjustment of status under Section 245A(a) is entitled under Section 245A(e)(1) to an automatic stay of deportation until the alien files an application for adjustment of status within the first 30 days of the application period. Such an alien shall also be authorized to engage in employment in the United States. Once the alien does file an application for adjustment of status, and presents a prima facie case of eligibility, then under Section 245A(e)(2) the automatic stay of deportation and the work authorization continue until a final determination on the application is made.<sup>3</sup>

3. Because respondent's unlawful residence in this country began before January 1, 1982, she meets one criterion for eligibility for legalization, and if she files a timely application she may well be able to meet her burden of proving that she meets the other subsection (a) criteria as well. Therefore, it may well be that respondent could eventually achieve a lawful status in this country and permanent residency under the new legalization program. Neither respondent nor any other alien, however, is yet eligible to receive, or even to file for, any perma-

<sup>3</sup> In addition to these provisions, Section 302(a) of the new Immigration Reform and Control Act adds a new Section 210 to the Act. Section 210 provides a legalization procedure, similar to that in Section 245A, for certain aliens who resided and performed "seasonal agricultural services" in the United States for at least 90 days during the 12-month period ending May 1, 1986. Because we have no basis to believe that respondent could qualify for legalization under Section 210, we limit our discussion in this memorandum to Section 245A.

ment benefits under the legalization program. For that reason, the mere passage of the new legislation has not rendered this case moot.

Even if respondent files an application under Section 245A while this case is still pending, that will not moot the case unless respondent also chooses to discontinue her asylum application. If respondent were to prevail on her claim of entitlement to asylum, she would be free from deportation for as long as she remained an asylee.<sup>4</sup> She would become eligible, subject to the quota and the eligibility criteria in Section 209(b) of the Act, for adjustment of status to that of a permanent resident one year after the grant of asylum. Particularly because the one-year minimum waiting period for asylees to become permanent residents is shorter than the corresponding 18-month waiting period for aliens granted legalization of status by the new Section 245A(a), and because respondent will not be eligible for legalization until the application period begins, asylum (if granted) could provide respondent a quicker route to permanent residency than legalization. In addition, respondent might be eligible for public welfare

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<sup>4</sup> Under the current regulations, grants of asylum by the immigration judge last for one year (8 C.F.R. 208.10(e)), but if the asylee remains in this country the status may and ordinarily will be renewed, in the absence of changed circumstances, until the asylee becomes a permanent resident under Section 209(b) of the Act, 8 U.S.C. 1159(b). Before the asylee achieves permanent resident status, however, his or her asylum status may be terminated on the ground that changed circumstances in the relevant foreign country eliminate the need for asylum, that the asylee poses a danger to the community of the United States, or that the asylee was not in fact eligible for asylum (8 C.F.R. 208.15(a)).

benefits at some point after a grant of asylum, whereas aliens granted lawful temporary resident status under Section 245A(a) are denied the right to certain public welfare benefits for five years after the grant of status (Section 245A(h)). For these reasons, it may be advantageous to respondent to continue to pursue her asylum application even if she eventually chooses to seek legalization under Section 245A.

In sum, as long as respondent continues to pursue her asylum application, we believe that there will remain a justiciable controversy between the parties. *INS v. Chadha*, 462 U.S. 919, 936-937 (1983).

4. The issue in this case remains basically no less important than it was when the Court granted certiorari. Although many aliens who unlawfully entered or remained in the United States before 1982 may now choose to seek legalization rather than asylum, others undoubtedly will continue to seek asylum for the reasons discussed above. In addition, the legalization option is unavailable to the large number of aliens whose unlawful presence in this country began (or will begin) in 1982 or later, except for those agricultural workers who qualify for legalization under new Section 210 (see note 3, *supra*). Aliens who are ineligible for legalization under Sections 245A and 210 can be expected to continue to press pending claims for asylum and to institute new claims for asylum. The asylum caseload of the agency and the courts, although it may shrink temporarily, will continue to be large, and it is important that this Court determine whether the asylum eligibility standard adopted by the agency is the correct one.

In sum, the new law provides no reason for the Court to refrain from deciding the case on the merits.

CHARLES FRIED  
*Solicitor General*

NOVEMBER 1986